court of appeals finding that the regulations are reasonable lack factual support. In light of this, the Constitutional dimensions of the limitation of ***Watchtower*** loom even larger.

CONCLUSION

The court of appeals judgment and opinion unconstitutionally infringes on the First and Fourteenth Amendment rights of residents of public housing and should be set aside. Therefore, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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In the
United States Court of Appeals
for the Fifth Circuit

No. 04-50363

ROSALINA DE LA O AND
MARIA CHRISTINA RIVERA,

Plaintiffs-Appellants,

VERSUS

HOUSING AUTHORITY OF THE CITY OF EL PASO, TEXAS,

Defendant-Appellee.

Appeal from the United States District Court
for the Western District of Texas

(Filed July 18, 2005)

Before SMITH, DENNIS and PRADO, Circuit Judges.

JERRY E. SMITH, Circuit Judge:

I.

In 2000, Jesus de la O and Roberto Vasquez sued to challenge certain regulations of the Housing Authority of the City of El Paso ("HACEP"). Vasquez, who did not reside in any HACEP facility, was a candidate for chair of the El Paso County Democratic Party and sought to distribute literature and to campaign door-to-door at Sherman Oaks, a HACEP facility. De la O resided at the Sun Plaza Apartments (a HACEP-operated subsidized

housing facility) and complained that the restrictions on political campaigning infringed on his First Amendment rights.

The challenged regulations included a "trespass after warning" policy and a policy restricting the distribution of flyers. These regulations were as follows:

> **Rule D.2. Trespassing.** The development premises are for the exclusive use and enjoyment of the residents, members of their households, their guests and visitors, and such other persons who have legitimate business on the premises, e.g., law enforcement and other governmental personnel, utility service workers, HACEP contractors, and others as authorized by HACEP. All other persons will be regarded as trespassers subject to prosecution as allowed by state or municipal ordinance.
>
> Any person who desires access to any development premises and any person found on the walks, ways, playgrounds, parking lots, drives and other common areas of the development premises will be required by any law enforcement or HACEP personnel to identify himself or herself and to prove authority to be on the development premises. Any person who refuses to provide personal identification or cannot show authority to be on the development premises will receive a "trespass warning" ordering the person to leave the development premises or be subject to arrest and prosecution to the extent permitted by state law or municipal ordinance.
>
> Any person observed by law enforcement or HACEP personnel violating any HACEP rule, or federal, state or municipal law, regulation, or ordinance will be ordered by law enforcement or

> HACEP personnel to leave the development premises.
>
> **Rule D.5. Notices and Flyers.** HACEP does not allow door-to-door sales. If a resident desires to distribute notices or flyers in his development, the resident must obtain advance approval of the Development's Housing Manager and provide the Housing Manager with a copy of the proposed notice or flyer. A resident may not distribute a notice or flyer before 9:00 a.m. or after 8:00 p.m. Under no circumstances will a notice or a flyer be left in plain view on a resident's door if a resident of the unit is not at home or declines to answer the door. A resident distributing such flyers or notices must do nothing to allow the flyers or notices to become litter or which would disrupt the peaceful use and enjoyment of the other residents in the development or the residents' use of common areas.

De la O v. HACEP, No. 02-CV-456, at 2 n.3 (W.D. Tex. Mar. 24, 2004).[1]

The district court dismissed on summary judgment, holding the challenged regulations constitutional. On appeal, a panel of this court reversed, holding that "the manner in which HACEP seeks to accomplish its goal of crime prevention is unreasonable under the circumstances herein presented," and the regulations were therefore unconstitutional.[2] The case, however, was voted en banc,

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[1] The text excerpted above constitutes the rules in effect at the time of the district court's decision in the present action. Nevertheless, the rules in effect at the time of the first *de la O* (*Vasquez*) action appear to have been substantially identical.

[2] *Vasquez v. HACEP,* 271 F.3d 198, 204 (5th Cir. 2001), *vacated for reh'g en banc,* 289 F.3d 350 (5th Cir. 2002), *order denying motion to*

(Continued on following page)

and after briefing and argument had concluded, de la O died. Because Vasquez had not filed an appeal, the absence of a living plaintiff rendered the case moot, and it was dismissed.

In 2002, de la O's widow, Rosalina de la O, and Maria Christina Rivera brought the current suit challenging HACEP's trespass and distribution rules. On HACEP's motion for summary judgment, the district court concluded that (1) no genuine issue of material fact remained for trial, (2) the HACEP facilities constitute non-public fora, (3) the rules were viewpoint neutral, and (4) the rules were reasonable. As a consequence, the court held that the rules did not violate the First Amendment and dismissed the plaintiffs' claims.

After this appeal was filed, HACEP voluntarily amended the rules, which now allow for non-residents to enter facilities to engage in political and religious activities door-to-door. The trespassing regulation now contains a section entitled "Political and Religious Activities," which explicitly allows any person to enter a HACEP development to engage in political campaigning and/or religious proselytizing. To take advantage of this new policy, a non-resident must provide advance notice to the development's management. Additionally, the policy no longer requires management's approval of a copy of a flyer in advance of its distribution. One must still give advance notice that he will be distributing literature.

At this court's request, the parties submitted supplemental briefing on the question whether these amendments

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substitute party and granting motion to dismiss appeal as moot, No. 00-50702 (5th Cir. Sept. 23, 2002), *cert. denied*, 536 U.S. 904 (2003).

render the case moot. HACEP contends the case is moot, and plaintiffs argue that their claims survive the amendments.

II.

The federal courts are empowered by Article III to hear "cases and controversies." U.S. CONST. art. III, § 2. Accordingly, an actual, live controversy must remain "at all stages of federal court proceedings, both at the trial and appellate levels."[3] That is, "[t]he requisite personal interest that must exist at the commencement of the litigation (standing) must continue throughout its existence (mootness).'"[4] Therefore, a request for injunctive relief remains live only so long as there is some present harm left to enjoin. HACEP contends that its amendment to the regulations renders de la O's claims moot.

A.

This logic is valid only insofar as it pertains to the claims for injunctive relief. It is well-established that "[c]laims for damages or other monetary relief automatically avoid mootness," so long as the underlying claim remains valid on its merits.[5] If, on the other hand, the

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[3] ERWIN CHEMERINSKY, FEDERAL JURISDICTION § 2.5.1, at 125 (4th ed. 2003).

[4] *United States Parole Comm'n v. Geraghty*, 445 U.S. 388, 397, 100 S.Ct. 1202, 63 L.Ed.2d 479 (1980) (quoting Henry Monaghan, *Constitutional Adjudication: The Who and When*, 82 YALE L.J. 1363, 1384 (1973)).

[5] 13A CHARLES A. WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE: JURISDICTION 2D § 3533.3, at text accompanying n.2.

defendants were immune from a damages award, it would be unnecessary for us to consider the constitutionality of the un-amended regulations.[6] Although such a result would allow us to avoid a constitutional question,[7] HACEP, the sole defendant, is an entity comprised wholly of members appointed by the mayor of El Paso. As an arm of local government, not an instrument of the state, it is not entitled to sovereign immunity under the Eleventh Amendment.[8] The doctrine of qualified immunity, furthermore, is applicable only to government officials, not municipal entities.[9] The pleading of a colorable claim for damages thus precludes a finding of mootness.

B.

The existence of the claim for damages, however, does not end our inquiry. That is, although we must consider the constitutionality of the rules (pre-amendment) for purposes of the damages claim, the plaintiffs continue to press their claim for injunctive relief against the amended rules. Neither side's brief addresses the problem of our court's reviewing, in the first instance, the constitutionality

[6] *See Chase v. McMasters*, 573 F.2d 1011, 1015 (8th Cir. 1978) (dismissing an otherwise viable claim for damages on immunity grounds).

[7] *See Ashwander v. Tenn. Valley Auth.*, 297 U.S. 288, 346-47 (1936) (Brandeis, J., concurring) (describing the doctrine of constitutional avoidance).

[8] *See Bd. of Trustees v. Garrett*, 531 U.S. 356, 368-69 (2001).

[9] *See Owen v. City of Independence, Mo.*, 445 U.S. 622, 653 n.37 (1980) ("[T]he justifications for immunizing officials from personal liability have little force when suit is brought against the governmental entity itself.").

of regulations that, in their current form, have not been evaluated by the district court.

One possible option for dealing with this dilemma would be to remand for the district court to have the first opportunity to consider the constitutionality of the amended regulations. Such an approach would be consistent with our policy that the court of appeals will not normally consider evidence or arguments not presented to the district court.[10]

On the other hand, remanding the case potentially creates further difficulties. For example, if we were to remand and the district court proceeded again to uphold the regulations as valid, HACEP could again amend its regulations while an appeal was pending. Such a circumstance necessarily would deprive the plaintiffs of any possibility of appellate review. Similar concerns have motivated the courts to recognize an exception to the mootness doctrine where a challenged behavior is voluntarily ceased by the defendant but the defendant is capable of resuming the practice at any time. *See, e.g., United States v. W.T. Grant Co.*, 345 U.S. 629, 632, 73 S.Ct. 894, 97 L.Ed. 1303 (1953).

Furthermore, were we to remand, the outcome in the district court is certain. Although the current regulations differ from those at issue before the district court, the new regulations are *less* restrictive than their predecessors. Given that the district court deemed the prior rules

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[10] *See Nissho-Iwai Am. Corp. v. Kline*, 845 F.2d 1300, 1307 (5th Cir. 1988) ("[O]ur review is confined to an examination of materials before the lower court at the time the ruling was made; subsequent materials are irrelevant.").

constitutionally permissible, that court presumably would find that the amended rules also pass constitutional muster. Under such circumstances, the decision to remand, aside from allowing for the evasion-of-review situation set forth above, would be inefficient. Consequently, the constitutionality of both sets of regulations is properly before us.

III.

De la O contends that the district court improperly disposed of the case on summary judgment despite the existence of issues of material fact. We review a summary judgment *de novo*. *Harris v. Rhodes*, 94 F.3d 196, 197 (5th Cir. 1996). Where, as here, we are considering a First Amendment challenge to a government regulation of speech in a non-public forum, the relevant question is whether the regulation is viewpoint-neutral and reasonable in light of the forum's purpose.[11] Therefore, summary judgments are appropriate only where there is no factual issue relating to the neutrality of a regulation (on its face or as applied) or with respect to the government's proffered support for the restriction's reasonableness.

The district court found that the restrictions are content- and viewpoint-neutral, facially and as applied. In its opinion granting summary judgment, the district court noted,

> Plaintiffs have not presented one scintilla of evidence that suggests that any political candidates

[11] Both our conclusion that the relevant forum is non-public in nature, and the relevant constitutional inquiry, will be discussed in much greater detail in part IV, *infra*.

> were denied access to HACEP's complexes because HACEP disagreed with a particular political message. Moreover, Plaintiffs have not presented any evidence to suggest Rules D.2 and D.5 were enacted, or are being applied, to censor those messages with which HACEP disagrees.

De la O, No. 02-CV-456, at 9. Although, in their supplemental brief on the mootness question, the plaintiffs reference their "challenge . . . as to application by selective enforcement," they point to little evidence in the record that could serve as the basis for disturbing the court's above-stated conclusion of content-neutrality.

With respect to the facts underlying the court's reasonableness conclusion, on the other hand, de la O asserts that affidavits in the record contradict the evidence proffered by HACEP, and accepted by the district court, in support of the reasonableness of the restrictions. Specifically, in holding that the rules were reasonable, the district court relied on the affidavit testimony of Ned Beman, HACEP's Director of Housing Management, who stated that the proffered purpose of the challenged rules is

> the protection and safety of HACEP's tenants, many of which are elderly residents and are frightened by door-to-door solicitors due to the fact that the majority of those arrested on HACEP property are non-residents engaged in narcotics distribution. Additionally, Beman's uncontradicted testimony reveals that the [INS] operates a surveillance station in at least one of its complexes, the Sun Plaza, because of the large number of undocumented aliens who pass through that complex.

Id. at 3.

Attempting to demonstrate that Beman's assertions are in fact in controversy, plaintiffs point to the affidavit of David Marquez, the former head of security at HACEP. In the first place, de la O makes no attempt to suggest which elements of Marquez's affidavit specifically raise factual issues. We review summary judgments *de novo*, using the same standard as that employed by the district court. Namely, once the moving party has demonstrated that the non-moving party has no evidence such that a reasonable jury could support a verdict in its favor, the non-moving party must put forth *specific facts* that demonstrate a genuine factual issue for trial. *Brennan v. Mercedes Benz*, 388 F.3d 133, 135 (5th Cir. 2004).

That is, once HACEP satisfied its burden by proffering Beman's testimony, the burden shifted to de la O to demonstrate a remaining factual controversy. The perfunctory and conclusional assertion that a particular affidavit creates such a conflict normally will not suffice. "Judges are not like pigs, hunting for truffles buried in briefs." *United States v. Dunkel*, 927 F.2d 955, 956 (7th Cir. 1991).

The shortcomings of plaintiffs' briefing aside, however, Marquez's affidavit creates no genuine issues of fact, but instead alleges that Marquez's experience did not indicate that door-to-door solicitation had ever yielded criminal activity. As HACEP ably points out, however, Beman never asserted anything to the contrary.

Rather, Beman asserted that allowing door-to-door solicitation might permit criminals to pose as legitimate visitors. He urged that a purpose of the regulation was to prevent crime. Marquez's observation does not raise a factual issue as to whether that purpose is factually correct. At best, his assertions produce competing factual

evidence for the court to weigh in determining, as a matter of law, whether the alleged purposes are served by the regulations, a determination that is necessary to its eventual reasonableness conclusion. No direct factual disputes, however, are raised.

Marquez's other statements that might possibly be construed as raising a genuine issue of fact also fail, because they do not appear to be based on personal knowledge, but rather on speculation. *See* FED. R. CIV. P. 56(e). Statements made on information and belief do not constitute proper summary judgment evidence under rule 56(e). *Bolen v. Dengel*, 340 F.3d 300, 313 (5th Cir. 2003).

For example, in response to Beman's assertion that elderly residents are fearful of door-to-door solicitors, Marquez stated that Beman's position is "at best an exaggeration." This conclusion is not apparently based on any specific personal knowledge on the part of Marquez, but rather on an unsubstantiated belief. Similarly, Marquez puts forth that it is his "understanding" that the local police chief and sheriff have declared El Paso among the country's safest cities. In addition to being patently not based on personal knowledge, this statement does little to refute Beman's assertions.

In sum, Marquez adds some facts to the record that the district court could easily consider when making its reasonableness conclusion as a matter of law. On the other hand, Marquez's affidavit does not squarely cast into doubt any of Beman's material assertions. To the extent that some aspects of the Marquez affidavit do attempt to refute Beman's positions, those passages do not constitute proper summary judgment evidence. Marquez does nothing to refute the premise that the rules in question are

advanced for the purpose of the protection and safety of the HACEP residents. With the exception of the prior-approval provision in Rule D.5, which we address *infra*, the district court therefore did not err by resolving the case on summary judgment.

IV.

As discussed above, the restrictions now in place require that (1) there be no distribution of flyers or notices between 8:00 p.m. and 9:00 a.m.; (2) a tenant wishing to distribute flyers during the permitted hours must give advance notice to the Housing Manager; (3) no flyers may be left on a tenant's door if no one answers; (4) non-residents may enter a HACEP facility for political and/or religious activities if they provide advance notice to the complex's manager, in writing or by telephone; (5) if a non-resident wishes to enter for religious or political purposes on a weekend, he must be certain to have given notice before the close of business on Friday; and (6) any door-to-door activities by non-residents must be carried out between 9:00 a.m. and 8:00 p.m.

A.

Although de la O is not claiming that she has been prevented from engaging in any activities, such as political campaigning, the right to receive information is as equally protected as is the right to convey it. *See Martin v. City of Struthers*, 319 U.S. 141, 143 (1943) (striking down ordinance prohibiting door-to-door distribution of handbills). Where regulations restricting speech touch only activities to be carried out on government property, however, we

review their validity under a framework different from the one we would use if the restriction swept more broadly.

"The existence of a right of access to public property and the standard by which limitations upon such a right must be evaluated differ depending on the character of the property at issue." *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 44 (1983). There are three distinct categories of government property.

The first category, traditional public fora, consists of those locations that "by long tradition or by government fiat have been devoted to assembly and debate." *Cornelius v. NAACP Legal Defense & Educ. Fund, Inc.*, 473 U.S. 788, 802 (1985). Traditional public fora include public streets and parks, "which 'have immemorially been held in trust for the use of the public, and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions.'" *Perry*, 460 U.S. at 44 (quoting *Hague v. CIO*, 307 U.S. 496, 515 (1939)).

The next category encompasses those areas that, although not traditionally places reserved for public expression, have been opened by the state for expressive activity. These designated public fora can include university meeting halls and municipal theaters. *See Widmar v. Vincent*, 454 U.S. 263, 277 (1981); *Southeastern Prods., Ltd. v. Conrad*, 420 U.S. 546, 555 (1975). The remaining public property is classified as non-public fora, a sweeping

category that includes a wide range of places such as jails, military bases, and interstate highway rest stops.[12]

Although restrictions on speech in public fora and designated public fora are closely scrutinized and are valid only if content-neutral and necessary to serve a compelling government interest, restrictions on the use of non-public fora are reviewed with far greater deference to policymakers. *Perry*, 460 U.S. at 46. In such fora, the state may enforce time, place, and manner restrictions and regulations intended to reserve the forum for its intended purpose "as long as the regulation on speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view." *Id.*

Because HACEP complexes are government-owned property, analysis of the validity of HACEP's restrictions on First Amendment activity requires us first to determine the type of forum these complexes constitute. Public housing facilities such as those which HACEP operates have repeatedly been held to constitute non-public fora.[13]

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[12] *See Adderley v. Florida*, 385 U.S. 39, 47-48 (1966); *M.N.C., Inc. v. United States Dep't of Defense*, 791 F.2d 1466, 1473 (11th Cir. 1986); *Sentinel Communications Co. v. Watts*, 936 F.2d 1189, 1204 (11th Cir. 1991).

[13] *See Daniel v. City of Tampa, Fla.*, 38 F.3d 546, 550 (11th Cir. 1994); *Crowder v. Housing Auth.*, 990 F.2d 586, 591 (11th Cir. 1993) (delineating library of housing project as non-public forum); *Daily v. New York City Housing Auth.*, 221 F.Supp.2d 390, 399 (S.D.N.Y. 2002) (holding that community center at housing project was non-public forum by default and a designated public forum "at times other than during the regularly scheduled educational activities"); *see also Vasquez*, 271 F.3d at 202 (holding that the HACEP facilities are non-public fora).

It is beyond dispute that the primary purpose for the very existence of HACEP's facilities is to provide affordable housing to those in El Paso needing financial assistance. Certainly, the complexes are used for social interaction, but HACEP was not created to facilitate the expression of ideas or serve as a meeting place for citizens. Other than making a cursory assertion that this case is distinguishable from *Daniel,* 38 F.3d at 550 (holding that housing projects are non-public fora), plaintiffs make no real attempt to explain how the complexes could be considered even designated public fora.[14] It seems obvious, therefore, that for purposes of our further analysis, HACEP's facilities are non-public fora.

B.

Even in non-public fora, the state may restrict speech only in such a manner as is reasonable and viewpoint-neutral. *See Perry,* 460 U.S. at 46. There is no evidence in the record even suggesting that HACEP has discriminated among speech on the basis of the viewpoint of the speaker, either on the face of the rules or in the manner in which they have been applied. Because the regulations are therefore viewpoint-neutral, they survive scrutiny so long as they are "reasonable in light of the purpose served by the forum." *Good News Club v. Milford Cent. Sch.,* 533 U.S. 98, 107 (2001).

It is difficult to see how, in light of the recent amendments, de la O can claim that the rules are unreasonable. A local government's proffered interest – crime prevention

[14] Indeed, at oral argument, appellants' counsel seemed to concede that the complexes at issue are non-public fora.

– is obviously a weighty one.[15] Furthermore, Beman's affidavit speaking to the presence of an INS surveillance operation onsite at one of the complexes demonstrates that an additional purpose of the trespassing regulation is to limit use of the complexes as havens for undocumented aliens.[16]

When examining the reasonableness of restrictions on speech, the existence of alternative channels of communication is integral.[17] Obviously a number of alternative channels exist here. Though one cannot, under the amended regulations, distribute flyers between 8:00 p.m. and 9:00 a.m., the vast majority of most residents' waking hours are within the times when such distribution is permitted.

Further, it is true that non-residents seeking to engage in political activities, spontaneously, on a weekend would be unable to do so. Nevertheless, spontaneous activity during weekday business hours (when advance notice could be given to the housing manager) is permissible.

Additionally, it is not that weekend activities are prohibited; rather, non-residents must only have the foresight to notify management, by the close of business on Friday, of their intention to go door-to-door over the weekend. Although this undoubtedly constitutes a burden,

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[15] *See, e.g., City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 47 (1986) (upholding zoning restrictions on nude dancing where restriction was designed to curtail crime).

[16] *See INS v. Delgado*, 466 U.S. 210, 223 (1984) (describing government's interest in enforcing immigration laws as "enormous").

[17] *See Vasquez*, 271 F.3d at 208 (Barksdale, J., dissenting).

it can hardly be dubbed a constitutionally unreasonable one in light of the alternatives presented to potential speakers.

In *Daniel*, 38 F.3d at 550, the court considered a trespass statute that was nearly identical to the restrictions used by HACEP *before* the recent amendments and concluded that the trespass statute was perfectly constitutional, partly in light of the alternative means of communication left open to speakers. That is, even if denied access to the entire complex, speakers would have access to adjacent streets and sidewalks to disseminate their messages. Under the amended regulations, the burdens on potential speakers are significantly lessened and are constitutionally permissible.

The plaintiffs' brief does not distinguish between arguments focused on the regulations pre-amendment and those attacking the current regulations. Regardless of which set of regulations are being attacked, the plaintiffs make two, ultimately unavailing, arguments that nevertheless warrant brief discussion.

First, de la O places great emphasis on *Watchtower Bible & Tract Society v. Village of Stratton*, 536 U.S. 150 (2002), in which the Court struck down a municipal ordinance that required the requisition of a permit before an individual could engage in door-to-door activities. Inasmuch as the ordinance applied to religious proselytizing, anonymous political speech, and the distribution of handbills, rather than commercial solicitation, the Court held that its restrictions were invalid. *Id.* at 165.

As much as de la O wishes to liken her case to *Watchtower*, it is inapposite. The ordinance at stake in *Watchtower* applied to the entire municipality and was not

limited to non-public fora such as the HACEP facilities. Tellingly, the Court did not even discuss forum analysis in its opinion. Consequently, it is obvious that *Watchtower* was decided under an entirely different rubric and is not controlling here.

Secondly, de la O argues that the HACEP regulations must be struck down because of their alleged overbreadth. It seems that de la O misconstrues the nature and function of the overbreadth doctrine. According to de la O,

> [T]he regulations sweep broadly, covering unpopular causes unrelated to commercial transactions or to any special interest in protecting the residents. Secondly, requiring a permit as a prior condition on the exercise of the right to speak imposes here a burden on the speech of citizens holding religious or patriotic views. Third, there is a significant amount of spontaneous speech that is effectively banned by the regulations. Even a spontaneous decision to go across the street, with a flyer, and urge a neighbor to vote against the mayor who appoints the HACEP board, could not lawfully be implemented without first obtaining permission from those who work for the board that is appointed by the Mayor. This kind of restrictions and inhibitions [sic] cannot withstand constitutional muster and must fail.

Although the above-quoted excerpt might serve as a persuasive argument for the unreasonableness of the statute under the applicable rubric of forum analysis, it has little to do with the doctrine of overbreadth. "[O]verbreadth challenges call for relaxing familiar requirements of standing, to allow a determination that the law would be unconstitutionally applied to different

parties and different circumstances from those at hand." *Sabri v. United States*, 541 U.S. 600, 609 (2004). For example, in *Virginia v. Hicks*, 539 U.S. 113, 118 (2003), the defendant sought to avoid conviction by invoking the overbreadth doctrine and challenging the constitutionality of a Virginia trespass statute.

> Hicks [did] not contend that he was engaged in constitutionally protected conduct when arrested; nor [did] he challenge the validity of the trespass statute under which he was convicted. Instead he claim[ed] that the RRHA policy barring him from Whitcomb Court [was] overbroad under the First Amendment, and cannot be applied to him – or anyone else.

Id.

In this case, therefore, overbreadth analysis might be helpful to de la O were she, say, a trespasser who was arrested pursuant to the HACEP regulations and yet was not on HACEP property to engage in First Amendment-protected conduct, but instead was present merely to loiter. In such a circumstance, normal standing requirements would preclude her from challenging the constitutionality of the regulations. Invoking overbreadth, however, would enable her to benefit from the same First Amendment arguments available to those who are legitimately burdened by allegedly unconstitutional restrictions.

In reality, however, de la O already has such standing. Her claim is predicated on her own supposed injury resulting from the alleged unconstitutionality of the HACEP regulations – that is, she is unable, for example, to receive unsolicited flyers and notices from non-residents

who have not given advance notice to housing management. The overbreadth argument, therefore, is inapplicable to de la O's case. The new regulations do not run afoul of the First Amendment, and the plaintiffs are not entitled to injunctive relief.

V.

Even though HACEP has voluntarily amended the challenged regulations, de la O's complaint seeks not only injunctive relief, but also damages. Consequently, as discussed above, HACEP's voluntary amendment of the rules does not render moot the plaintiffs' objections to the prior regulations, so we must consider, in addition to the constitutionality of the amended regulations, the propriety of the regulations as they existed at the time of the district court's decision.

The changes in the regulations certainly have no effect on the nature of the forum in question. That is, HACEP facilities have been non-public fora both before and after the amendments to the regulations. Similarly, there is no indication in the record that the previous regulations were anything but completely neutral as to content and viewpoint, both on their face and as applied. The relevant inquiry, therefore, goes to the "reasonableness" of those regulations with reference to the purpose of the forum. *See Good News Club,* 533 U.S. at 107, 121 S.Ct. 2093.

Before their amendment, the regulations restricted access to the HACEP complexes by uninvited non-residents to those "persons who have legitimate business on the premises, e.g., law enforcement and other governmental personnel, utility service workers, HACEP contractors, and

others as authorized by HACEP." All others found on the property would receive a trespass warning and would be forced to leave or face arrest. Before the amendments, this regulation had no provision excepting those wishing to enter the property to engage in political campaigning or religious proselytizing. Additionally, residents wishing to distribute notices or flyers, door-to-door, were forced to submit a copy, to management, of the literature to be distributed and to receive prior approval.

Considering the constitutionality of the former regulations, in *Vasquez*, 271 F.3d at 206, the panel majority concluded that the pre-amendment regulations were "an unreasonable restriction on the freedoms guaranteed by the First Amendment." In reaching its decision, the panel relied heavily on the importance of door-to-door campaigning in our democratic system. Because HACEP residents "generally conduct themselves like individuals in any other neighborhood in El Paso . . . the citizens who reside in the HACEP developments deserve access to political information in the same manner as other citizens of El Paso." *Id.* at 204.

In response, Judge Barksdale dissented, emphasizing that the purpose of the HACEP facilities is to provide housing, not a "meeting place for the exchange of ideas." *Id.* at 208. Additionally, the fact that there are a multitude of alternative channels of communication, such as the streets and sidewalks surrounding HACEP complexes, provides further evidence of the reasonableness of the restrictions.

Despite an otherwise exhaustive analysis of the issue, the exchange between the majority and the dissent in *Vasquez* omitted a key aspect of the issue. Rule D.5, before

amendment, required that "[i]f a resident desires to distribute notices or flyers in his development, the resident must obtain advance approval of the Development's Housing Manager and provide the Housing Manager with a copy of the proposed notice or flyer." De la O argues now on appeal that "[t]he Court has held that a requirement that one must register before he undertakes to make a speech to enlist support for a lawful movement is quite incompatible with the requirements of the First Amendment." *See Thomas v. Collins,* 323 U.S. 516, 539-40 (1945). The Supreme Court has repeatedly reaffirmed that prior registration requirements are troubling in the free speech context.[18]

The district court, in its otherwise comprehensive and persuasive order, gave scant attention to the specific advance-approval requirement of Rule D.5. The court did, however, make the blanket statement (which we have previously noted) that "Plaintiffs have not presented any evidence to suggest Rules D.2 and D.5 were enacted, or are being applied, to censor those messages with which HACEP disagrees."

That statement is somewhat called into question by summary judgment evidence from an affiant named Valverde, alleging that she had a falling out with HACEP management and certain fellow residents regarding her presidency of the residents' association, stating that "I as a courtesy advised Linda Pena, Assistant Project Manager that I was going to leaflet the flyer herein contained as

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[18] *See Watchtower,* 536 U.S. at 164; *Hynes v. Mayor & Council,* 425 U.S. 610, 629 n.4 (1976); *Eisenstadt v. Baird,* 405 U.S. 438, 455 (1972) (Douglas, J., concurring).

Exhibit 'B.' I did so in order to in order [*sic*] defend my name. Later that day I was instructed by Linda Pena, to stop leafleting. She said that the order came from Bernie Rodriguez, Project Manager."

It is undeniable that the Constitution forbids the use of a leafleting policy to quell certain points of view. It is therefore necessary to vacate and remand, but only as to the former version of Rule D.5, so the district court can determine whether it was used to discriminate on the basis of viewpoint, and if so, whether there was compensable injury. It may be that, given the remainder of our determinations regarding the past and present rules, the plaintiffs will no longer find it advisable to pursue this very small portion of the case, but that is for the district court and parties to resolve.

VI.

In summary, despite HACEP's voluntary decision to amend the challenged regulations, a live controversy remains. With the exception of the former Rule D.5 regarding prior approval, the present and past regulations pass constitutional muster because the housing facilities are non-public fora.

The HACEP facilities are non-public fora and, thus, restrictions on speech within their confines are valid so long as they are viewpoint-neutral and reasonable in light of the purpose of the forum. The amended regulations dispense with most of the problems to which the *Vasquez* majority pointed. Under the deferential "reasonableness" standard, they are constitutional. The prior regulations present a closer question but, in light of the overriding need to provide safe housing, they are constitutional with

the exception noted above. The judgment is AFFIRMED, except that the portion of the judgment that blesses the former Rule D.5 is VACATED and REMANDED for any further proceedings that may be needed.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
EL PASO DIVISION

ROSALINA DE LA O, and,	)	
MARIA CHRISTINA RIVERA	)	
Plaintiffs,	)	
	)	
v.	)	**EP-02-CA-0456-DB**
	)	
HOUSING AUTHORITY OF	)	
THE CITY OF EL PASO	)	
Defendant.	)	

FINAL JUDGMENT

(Filed Mar. 24, 2004)

On this day, the Court entered an Order granting Defendant the Housing Authority of the City of El Paso's "Amended Motion For Summary Judgment" filed in this cause. The Court now enters its Final Judgment pursuant to Rule 58 of the Federal Rules of Civil Procedure.

Accordingly, **IT HEREBY IS ORDERED** that Defendant the Housing Authority of the City of El Paso's "Amended Motion For Summary Judgment" is **GRANTED**.

IT FURTHER IS ORDERED that the above-captioned cause is **DISMISSED WITH PREJUDICE**.

IT FINALLY IS ORDERED that all other pending motions, if any, are **DENIED AS MOOT**.

SIGNED this **24th** day of **March, 2004.**

/s/ David Briones
THE HONORABLE
DAVID BRIONES
UNITED STATES
DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
EL PASO DIVISION

ROSALINA DE LA O, and,	)	
MARIA CHRISTINA RIVERA	)	
Plaintiffs,	)	
	)	
v.	)	**EP-02-CA-0456-DB**
	)	
HOUSING AUTHORITY OF	)	
THE CITY OF EL PASO	)	
Defendant.	)	

MEMORANDUM OPINION AND ORDER

(Filed Mar. 24, 2004)

On this day, the Court considered Defendant the Housing Authority of the City of El Paso's ("HACEP") "Amended Motion to Dismiss and Motion for Summary Judgment and Memorandum of Authorities In Support" ("Amended Motion to Dismiss and Motion for Summary Judgment"), filed in the above captioned cause on December 3, 2002.[1] On December 16, 2002, Plaintiffs Rosalina De La O ("De La O") and Maria Christina Rivera ("Rivera") (collectively, "Plaintiffs") filed a "Reply in Opposition to Defendant's Amended Motion to Dismiss and Motion for

[1] On February 24, 2003, the Court entered an Order denying Defendant's initial "Motion to Dismiss and Motion for Summary Judgment" as moot. In said Order, the Court instructs the parties that it will proceed to consider Defendant's Amended Motion to Dismiss, Plaintiff's Second Response, and Defendant's Reply, which are dealt with in this Memorandum Opinion and Order. Needless to say, the Parties have demonstrated a difficulty in labeling their pleadings in a correct and succinct fashion. Nevertheless, the Court will deal with the key arguments that never seemed to change in the pleadings that succeeded Defendant's Amended Motion to Dismiss.

Summary Judgment with Memorandum of Law" ("Second Response"). Defendants filed a "Reply in Support of Motion To Dismiss and Motion For Summary Judgment" ("Reply") on January 3, 2003. On April 10, 2003, Plaintiffs filed a "Supplemental Reply In Opposition To Defendant's Amended Motion To Dismiss and Motion For Summary Judgment With Memorandum of Law" ("Supplemental Response"). And finally, Plaintiff's filed a "Response To Defendnt's [*sic*] Supplemental Reply In Support of Motion To Dismiss and Motion For Summary Judgment" ("Sur-Reply") on April 29, 2003. After due consideration, the Court is of the opinion that HACEP's Amended Motion should be granted for the reasons that follow.

Facts & Procedural History

HACEP is a housing authority which maintains various government-owned housing complexes for use by eligible low income residents of El Paso, Texas. Plaintiffs are tenants of one of HACEP's complexes, the Sun Plaza Apartments ("Sun Plaza").[2] Like other HACEP properties, Sun Plaza is governed by Rules D.2 and D.5 contained in the "Housing Authority of the City of El Paso Community and Resident Rules for Public Housing Program and Section 8 New Construction Program," which limits access by non-residents to HACEP's complexes.[3]

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[2] All HACEP complexes are adjacent to city-owned streets and sidewalks. Some HACEP complexes have city-owned streets and sidewalks within them.

[3] Rule D.2 ("trespass after warning" rule), provides as follows:

> Trespassing. The development premises are for the exclusive use and enjoyment of the residents, members of their households, their guests and visitors, and such other persons who

(Continued on following page)

Ned Beman, HACEP's Director of Housing Management, establishes in an affidavit that the purpose of Rules

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have legitimate business on the premises, e.g., law enforcement and other governmental personnel, utility service workers, HACEP contractors, and others as authorized by HACEP. All other persons will be regarded as trespassers subject to prosecution as allowed by state or municipal ordinance.

Any person who desires access to any development premises and any person found on the walks, ways, playgrounds, parking lots, drives and other common areas of the development premises will be required by any law enforcement or HACEP personnel to identify himself or herself and to prove authority to be on the development premises. Any person who refuses to provide personal identification or cannot show authority to be on the development premises will receive a "trespass warning" ordering the person to leave the development premises or be subject to arrest and prosecution to the extent permitted by state law or municipal ordinance.

Any person observed by law enforcement or HACEP personnel violating any HACEP rule, or federal, state or municipal law, regulation, or ordinance will be ordered by law enforcement or HACEP personnel to leave the development premises.

Rule D.5 ("door-to-door solicitation rule"), provides as follows:

Notices and Flyers. HACEP does not allow door-to-door sales. If a resident desires to distribute notices or flyers in his development, the resident must obtain advance approval of the Development's Housing Manager and provide the Housing Manager with a copy of the proposed notice or flyer. A resident may not distribute a notice or flyer before 9:00 a.m. or after 8:00 p.m. Under no circumstances will a notice or a flyer be left in plain view on a resident's door if a resident of the unit is not at home or declines to answer the door. A resident distributing such flyers or notices must do nothing to allow the flyers or notices to become litter or which would disrupt the peaceful use and enjoyment of the other residents in the development or the residents' use of common areas.

D.2 and D.5 are for the protection and safety of HACEP's tenants, many of which are elderly residents and are frightened by door-to-door solicitors due to the fact that the majority of those arrested on HACEP property are non-residents engaged in narcotics distribution. Additionally, Beman's uncontradicted testimony reveals that the United States Immigration and Naturalization Service operates a surveillance station in at least one of its complexes, the Sun Plaza, because of the large number of undocumented aliens who pass through that complex.

Plaintiffs initiated this lawsuit on October 1, 2002, and by their Amended Complaint, Plaintiffs assert five causes of action arguing that Rules D.2 and D.5 violate their rights under the "First, Fifth and Fourteenth amendments to the United States Constitution," and "42 U.S.C. §§ 1983 [and] 1988." On November 22, 2002, Plaintiffs filed a "First Amended Original Complaint and Application For Injunctive Relief" ("Amended Complaint").

In said Amended Complaint, Plaintiffs assert five causes of action, the third cause being a petition for permanent injunctive relief. In essence, Plaintiffs argue that HACEP's rules violate their civil rights because it bans and restricts speech by barring the right to campaign door-to-door on HACEP property and to distribute campaign literature to its residents. Plaintiffs maintain that the rules violate their rights to receive such campaign information from candidates and, in turn, to reciprocate by expressing her view to those candidates. Plaintiffs also maintain that Rules D.2 and D.5 are overbroad. Plaintiffs also aver that Rules D.2 and D.5 violate their right of equal protection under the law.

On October 7, 2002, the Court issued a Temporary Restraining Order ("TRO") in this cause, enjoining HACEP from prohibiting political candidates, and their volunteers, from canvassing door-to-door on HACEP's property until a final hearing was held on the matter. On October 17, 2002, the Court held a hearing where it upheld the TRO. The Parties' instant Motion followed.[4]

Standard on Motion for Summary Judgment

To the extent that the Court goes beyond the original pleadings in this cause, the Court treats the instant Motion as motion for summary judgment pursuant to Rule 56, because the alternative facilitates disposition of this action. *See* 5A CHARLES A. WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1366 (2d ed. 1990 & Supp. 2000).

Summary judgment should be granted only where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c). The party that moves for summary judgment bears the initial burden of identifying

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[4] On July 13, 2000, the Court entered a "Memorandum Opinion and Order" granting Defendant's Motion for Summary Judgment in a separate case, *Vasquez v. Housing Authority of The City of El Paso* ("*Vasquez* Opinion"), EP-00-CA-089-DB. Said opinion dealt with issues that were virtually identical to this cause of action, save one of the Plaintiffs in *Vasquez* was a political candidate who sought to disseminate his platform(s) on HACEP property. The Court maintains the same reasoning and builds upon the bedrock established in the *Vasquez* Opinion when ruling on the instant motion.

those portions of the pleadings and discovery on file, together with any affidavits, which it believes demonstrate the absence of a genuine issue of material fact. *See, e.g., Celotex Corp. v. Catrett,* 477 U.S. 317, 323, 106 S.Ct. 2548, 2553, 91 L.Ed.2d 265 (1986). "If the moving party fails to meet this burden, the motion must be denied, regardless of the nonmovant's response." *Tubacex, Inc. v. M/V Risan,* 45 F.3d 951, 954 (5th Cir. 1995). If the movant does meet this burden, however, the nonmovant must go beyond the pleadings and designate specific facts showing that there is a genuine issue for trial. *See, e.g., Celotex,* 477 U.S. at 324, 106 S.Ct. at 2553. "If the nonmovant fails to meet this burden, then summary judgment is appropriate." *Tubacex,* 45 F.3d at 954.

When making a determination under Rule 56, factual questions and inferences are viewed in a light most favorable to the nonmovant. *See Lemelle v. Universal Mfg. Corp.,* 18 F.3d 1268, 1272 (5th Cir. 1994). The party opposing a motion supported by evidence cannot discharge his burden by alleging mere legal conclusions. *See Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 248-49, 106 S.Ct. 2505, 2510-11, 91 L.Ed.2d 202 (1986). Instead, the party must present affirmative evidence in order to defeat a properly supported motion for summary judgment. *See id.*

Discussion

As indicated, Plaintiffs challenge Rules D.2 and D.5 under the First, Fifth and Fourteenth amendments to the United States Constitution, and 42 U.S.C. §§ 1983 [and] 1988.

I. Fourth Amendment and 42 U.S.C. § 1988

As an initial matter, the Court dismisses certain legal grounds needlessly raised in the instant Motion.[5] Plaintiffs completely disregard the *Vasquez* Opinion by stating that this case is brought pursuant to, *inter alia,* the Fourth Amendment to the United States Constitution and 42 U.S.C. § 1988.

Once again, the Court notes that the Fourth Amendment governs "[t]he right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures" by governmental actors, which are obviously not in play in this cause.

Furthermore, 42 U.S.C. § 1988 does not create a separate cause of action; rather, it concerns the "proceedings in vindication of civil rights" and provides for the discretionary recovery of attorney's fees to a prevailing party on claims brought pursuant to, among other statutes, 42 U.S.C. §§ 1981, 1982 and 1983. 42 U.S.C.A. § 1988 (West 2003). Thus, the Court is left to consider only Plaintiffs' claims under 42 U.S.C. § 1983, as related to the rights protected by the First, Fifth, and Fourteenth Amendments. The Court now proceeds to address those claims.

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[5] The Court's patience is wearing thin since Counsel for both parties in this cause of action also participated in the *Vasquez* litigation. Said Counsel should have been intimately familiar with the legal intricacies covered in the *Vasquez* Opinion because the Court does not have the luxury of time to deal with issues that could be easily omitted by attentive Counsel.

II. 42 U.S.C. § 1983

In relevant part, 42 U.S.C. § 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . , subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . . .

"Rather than creating substantive rights, § 1983 simply provides a remedy for the rights that it designates." *Johnston v. Harris County Flood Control Dist.*, 869 F.2d 1565, 1573 (5th Cir. 1989). "Thus, an underlying constitutional or statutory violation is a predicate to liability under § 1983." *Id.*

Here, as previously indicated, Plaintiffs argue Rules D.2 and D.5 violate their First Amendment rights and deny them equal protection under the law pursuant to the Fourteenth Amendment. Conversely, HACEP argues that its rules survive constitutional scrutiny. The Court agrees with HACEP.

In general, the "First Amendment does not guarantee access to property simply because it is owned or controlled by the government." *United States Postal Serv. v. Council of Greenburgh Civic Ass'ns*, 453 U.S. 114, 129, 101 S.Ct. 2676, 2685, 69 L.Ed.2d 517 (1981). Rather, "[t]he existence of a right of access to public property and the standard by which limitations upon such a right must be evaluated differ depending on the character of the property at issue."

Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 44, 103 S.Ct. 948, 954, 74 L.Ed.2d 794 (1983).

In *Perry*, the Supreme Court announced a "forum-based" approach to determine the constitutionality of governmental restrictions imposed on the use of its property. There, "the Court identified three types of fora: the traditional public forum, the public forum created by government designation, and the nonpublic forum." *Cornelius v. NAACP Legal Defense and Educ. Fund, Inc.*, 473 U.S. 788, 802, 105 S.Ct. 3439, 3449, 87 L.Ed.2d 567 (1985). "Traditional public fora are those places which 'by long tradition or by government fiat have been devoted to assembly and debate, such as public streets and parks.'" *Id.* (quoting *Perry*, 460 U.S. at 45, 103 S.Ct. at 954.) "In addition to traditional public fora, a public forum may be created by government designation of a place or channel of communication for use by the public at large for assembly and speech, for use by certain speakers, or for the discussion of certain subjects." *Id.* (citing *Perry*, 460 U.S. at 45-46 and n.7, 103 S.Ct. at 955 and n.7). Finally, there is the nonpublic forum, the residual class of government-owned property, to which the First Amendment does not guarantee access. *See Perry*, 460 U.S. at 46, 103 S.Ct. at 955; *Doe v. Santa Fe Indep. Sch. Dist.*, 168 F.3d 806, 819 (5th Cir. 1999). Government restrictions of speech in a traditional or designated public forum are subject to a strict scrutiny analysis, whereby such restrictions must be narrowly tailored to serve a compelling governmental interest. *See Hobbs v. Hawkins*, 968 F.2d 471, 481 (5th Cir. 1992); *Cornelius*, 473 U.S. at 800, 105 S.Ct. at 3448. By contrast, governmental restrictions on speech, even a complete prohibition on speech, in a non-public forum survive as long as they are reasonable in light of the purpose served

by the forum and are viewpoint-neutral. *See Hobbs,* 968 F.2d at 481; *see also Cornelius,* 473 U.S. at 800, 105 S.Ct. at 3448; *Perry,* 460 U.S. at 46, 103 S.Ct. at 955.

In *Daniel v. City of Tampa, Fla.,* 38 F.3d 546 (11th Cir. 1994), the United States Court of Appeals for the Eleventh Circuit addressed the constitutionality of Fla. Stat. ch. 810.09, a statute nearly identical to Rule D.5 here. In so doing, the *Daniel* court concluded, among other things and like other courts which have considered the matter, that Florida's housing authority complexes, like HACEP's complexes, are non-public forums. *See id.* at 550; *see also De La O v. Housing Authority of El Paso,* EP-98-CA-52-H, slip op. at 3 (W.D.Tex. Feb. 11, 1999) (finding HACEP's Sun Plaza complex non-public forum). Yet again, the Court remains true to precepts expressed in the *Vasquez* Opinion by concluding that HACEP's complexes are "non-public forums." The purpose of HACEP is to offer affordable housing to the low income community, not to provide non-residents with a place to dispense their political ideology. This is evinced by HACEP limiting access to residents of the complex, their invited guests, and those conducting official business. Therefore, HACEP's restrictions on access to its property pass scrutiny so long as those restrictions are viewpoint-neutral and reasonable. *See, e.g., Hobbs,* 968 F.2d at 481. The Court finds HACEP's rules satisfy both constitutional requirements.

First, Plaintiffs have not presented one scintilla of evidence that suggests that any political candidates were denied access to HACEP's complexes because HACEP disagreed with a particular political message. Moreover, Plaintiffs have not presented any evidence to suggest Rules D.2 and D.5 were enacted, or are being applied, to censor those messages with which HACEP disagrees.

Thus, the Court concludes HACEP's rules are content-neutral.

With regards to the reasonableness of the rules, the Court finds that Rules D.2 and D.5 are a reasonable means of combating the above-mentioned criminal activity that, according to Defendant's uncontradicted summary judgment evidence, occurs on its property by nonresidents. The Court also notes that political candidates who are campaigning do, in fact, have access to the city-owned streets and sidewalks adjacent to HACEP's complexes, and in some instances, are contained within those complexes, to disseminate their political platform(s). *See Daniel,* 38 F.3d at 550 (finding unlimited access to adjacent city-owned streets and sidewalks important factor in determining reasonableness of Florida's trespass after warning statute). Similarly, Plaintiffs have the right to invite any political candidate to her residence to discuss that individual's candidacy, without running afoul of the rules. In the final analysis, because HACEP's rules are both content-neutral and reasonable, the Court finds HACEP's implementation of those rules do not violate Plaintiffs' First Amendment rights. Having so decided, the Court now addresses Plaintiffs' overbreadth challenge.

Rules D.2 and D.5 will survive an overbreadth challenge unless they reach a "'substantial amount of constitutionally protected conduct.'" *United States v. Wicker,* 933 F.2d 284, 287 (5th Cir. 1991) (quoting *Village of Hoffman Estates v. Flipside,* 455 U.S. 489, 494, 102 S.Ct. 1186, 1191, 71 L.Ed.2d 362 (1982)). The overbreadth analysis primarily has been used to invalidate governmental restrictions affecting freedoms of expression and association protected by the First Amendment. *See id.* Since the Plaintiffs failed to put forth any evidence as to how Rules

D.2 and D.5 tread upon their rights of expression and association protected by the First Amendment, the Court finds Plaintiffs' overbreadth challenge likewise fails. The Court now addresses Plaintiffs' equal protection claim pursuant to the Fourteenth Amendment.

Plaintiffs argue the HACEP rules in question violate their equal protection rights because HACEP "prohibits candidates and all others from going door-to-door[, which] deprives plaintiffs of their right to equal protection because all other Americans, and all other El Pasoans, are guaranteed the right to door-to-door political solicitation by candidates and other purveyors of information . . . " As in *Vasquez*, Defendant erroneously retorts that its rules do not violate Plaintiffs' equal protection rights as long as its rules "provide[] citizens with clear notice of what is prohibited, and enforcement of the policy leaves little to the discretion of the enforcer." As explained in the *Vasquez* Opinion, HACEP's proposition of law is better suited to an analysis of whether a governmental regulation is constitutionally void for vagueness. *See, e.g., Kolender v. Lawson*, 461 U.S. 352, 357, 103 S.Ct. 1855, 1858, 75 L.Ed.2d 903 (1983) ("[T]he void for vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement."). Instead, the Court finds the more appropriate framework applicable to analyzing Plaintiffs' equal protection claim to be that set forth in *New Orleans v. Dukes*, 427 U.S. 297, 303, 96 S.Ct. 2513, 2516-17, 49 L.Ed.2d 511 (1976), where the Supreme Court stated, "[u]nless a classification trammels fundamental personal rights or is drawn upon inherently suspect distinctions such as race, religion, or

alienage, our decisions presume the constitutionality of the statutory discriminations and require only that the classification challenged be rationally related to a legitimate state interest." When fundamental rights or suspect classifications are involved, however, stricter judicial scrutiny is called for. *See id.*

Here, Rules D.2 and D.5 are not "drawn upon [an] inherently suspect distinction[ ] such as race, religion, or alienage," thus they are not subject to any heightened equal protection scrutiny. *See id.* Moreover, because the right to canvass door-to-door in order to solicit campaign support in a non-public forum is not a fundamental right, per se, in the constitutional sense, any alleged classification created by HACEP must be merely rationally related to a legitimate state interest. *See id.* Public housing authority trespass policies extending to development streets and sidewalks have been deemed fortified against Fourteenth Amendment substantive and procedural due process challenges. *See* Peter M. Flanagan, *Trespass-Zoning: Ensuring Neighborhoods A Safer Furture By Excluding Those With A Criminal Past,* 79 Notre Dame L.Rev. 383 (2003). HACEP must simply have some minimal justification for treating non-residents differently from residents. As previously indicated, such justification exists because HACEP complexes suffer from criminal activity, the majority of which is committed by non-residents. Because the Court finds HACEP Rules D.2 and D.5 rationally related to the problem for which they were designed to address, Plaintiffs' equal protection claim fails. Thus, having reviewed the summary judgment evidence presented and resolved all factual doubts in Plaintiffs' favor, the Court finds no outstanding issues of material fact exist

with respect to Plaintiffs' claims and thus HACEP is entitled to judgment as a matter of law on those claims.

Accordingly, **IT HEREBY IS ORDERED** that Defendant the Housing Authority of the City of El Paso's "Amended Motion for Summary Judgment" is **GRANTED.**

IT FURTHER IS ORDERED that the "Temporary Restraining Order" entered in this cause on October 7, 2002, is **VACATED.**

IT FURTHER IS ORDERED that the above-captioned cause is **DISMISSED WITH PREJUDICE.**

IT FINALLY IS ORDERED that all other pending motions, if any, are **DENIED AS MOOT.**

SIGNED this **24th** day of **March, 2004.**

/s/ David Briones
THE HONORABLE
DAVID BRIONES
UNITED STATES
DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS

DE LA O, Plaintiff, v. HOUSING AUTHORITY OF THE CITY OF EL PASO, Defendant.	§ § § § § § § §	NO. EP-98-CA-52-H

MEMORANDUM OPINION AND ORDER

(Filed Feb. 11, 1999)

This is a civil action for damages and for declaratory and injunctive relief. Jurisdiction in this Court is founded upon 28 U.S.C. §§ 1331 and 1343(a)(3) and 42 U.S.C. § 1983. The case was tried to the Court without a jury. The Court's findings of fact and conclusions of law are incorporated in this opinion.

Plaintiff Jesus De La O is a seventy-one year-old resident of the City of El Paso. Defendant Housing Authority of the City of El Paso is a public housing authority which maintains approximately forty different housing complexes providing some 7000 living units for low income El Pasoans. At all times relevant to this suit, the Plaintiff was a resident of the Housing Authority complex known as the Sun Plaza Apartments, located at 1221 East San Antonio Street. The Sun Plaza complex consists of a high-rise apartment building containing over 200 apartments surrounded by 121 small living units called "cottages". The Plaintiff and his wife commenced residence in one of the cottages in 1994. The Plaintiff and his spouse as lessees

and the Housing Authority as lessor executed a standard lease at that time (Defendant's Exhibit 7).

Plaintiff is politically active, and has been a candidate for elective office on several occasions. His most recent try for political office was in 1997, when he filed as a candidate for City Council Representative Place 8 in the municipal election of that year. In furtherance of his candidacy, the Plaintiff placed political signs in and around his cottage and also went door-to-door in the son Plaza Complex asking his neighbors to vote for him. Representatives of the Defendant notified the Plaintiff that this violated the rules of the Housing Authority, and that he was subject to eviction if he did not cease attempting to solicit votes in this manner. The Plaintiff understandably demanded a written explanation as to why the Housing Authority was prohibiting him from campaigning in this way. In response, he received a letter from the Executive Director of the Housing Authority which is in evidence (Plaintiff's Exhibit 2).

There were five candidates, including the Plaintiff, in the race for City Representative Place 8 in the April, 1997 election. When the votes were counted, the Plaintiff finished third. Two other candidates, Elvia Hernandez and Manny Ramirez, received more votes than the Plaintiff, and those two candidates faced each other in a run-off election. No doubt feeling bitter about his defeat, but even more bitter about the treatment he had received at the hands of the Housing Authority, the Plaintiff brought this suit.

Government owned property, such as the Housing Authority property in this case, falls into three categories for purposes of the First Amendment. The first category is

the traditional public forum, which has as its principal purpose the free exchange of ideas. See **United States v. Kokinda**, 497 U.S. 720, 725-26 (1990). The second category is the designated forum, defined as government property which is intentionally opened to the public for the purpose of expressive activity. **United States v. Kokinda, supra**. The third category is the nonpublic forum. An attempt by government to restrict or limit speech or expression in a traditional public forum or a designated public forum is subject to strict scrutiny, and the government has the burden of showing that the restriction is narrowly tailored to serve a compelling state interest. **See Cornelius v. NAACP Legal Defense and Education Fund, Inc.**, 473 U.S. 788 (1985). In order to place restrictions upon speech and expression in a nonpublic forum, however, the government need only show that the limitation is reasonable and viewpoint neutral. **See United States v. Kokinda, supra** at 726-27. In the instant case, the Court has previously held that the Sun Plaza Housing Complex is a nonpublic forum. **See Daniel v. City of Tampa, Florida**, 38 F.3d 546, 549 (11th Cir. 1994) (holding that a public housing complex was a nonpublic forum). Therefore, the Plaintiff had the burden of showing by a preponderance of the evidence that the rules which the Defendant sought to enforce were not reasonable, or not viewpoint neutral, or both.

The Court is faced at the outset with the problem that in March, 1997 no written "rule" existed in the form of a board resolution, a written provision in a Housing Authority manual, or a provision in the standard Housing Authority lease itself. In seeking to justify the restrictions it attempted to place on the Plaintiff, therefore, the Defendant can only point weakly to (1) an unwritten "no

solicitation" policy and (2) a vague and general paragraph in the standard lease (Defendant's Exhibit 7, para. M). As to the Defendant's first theory, it is obvious from the testimony that any "no solicitation" policy that may have existed in 1997 was directed at outsiders such as magazine salesmen or insurance peddlers who might attempt to enter a housing complex and sell their wares to the residents. As to the Defendant's second theory, it should suffice to quote in full the provisions of paragraph M of the tenant lease as it existed in March, 1997:

> Resident agrees ... to conduct himself/herself and to cause Resident's household members and guests to conduct themselves in such a manner as not to disturb the neighbor's peaceful enjoyment of their [sic] accommodations or community facilities; to refrain from illegal or other activity which would impair the physical or social environment of the complex; to act in such a way as to be conducive to maintaining the complex in a decent, safe, and sanitary condition.

Giving the lease language its plain, common, ordinary, English language, dictionary meaning leads to the conclusion that it is not a restriction on any peaceful, legitimate political activity by a legal resident of the complex.

On March 6, 1997, Roberto Alvarado, then Executive Director of the Housing Authority, was obliged to notify the Plaintiff in writing as to why he could not campaign for votes among his fellow residents in the Sun Plaza Complex. Mr. Alvarado told the Plaintiff:

> ... [T]hat the Housing Authority does not allow political activity on Housing Authority property, except for Resident Association sponsored debates that allow all candidates for a *specific office*

> an *equal opportunity* to present their issues or agenda in one joint meeting that has been expressively [sic] approved by the Housing Authority.

(Plaintiff's Exhibit 2) (Emphasis in the original). There are two obvious problems with the restriction on speech and expression announced by Alvarado: (1) it is not reasonable, and (2) it is not viewpoint neutral.

The Court has no difficulty in finding that the Defendant could not, consistent with the First and Fourteenth Amendments, prohibit the Plaintiff from displaying a sign or placard advertising his candidacy in the window of his own apartment. Director Alvarado admitted as much in his trial testimony.[1] By the same token, the Defendant could not, consistent with the First and Fourteenth Amendments, prohibit the Plaintiff from going door-to-door within the complex in which he resided and asking his neighbors to vote for him in the election. Once again, Director Alvarado admitted as much in his trial testimony. However, Director Alvarado has not abandoned his position that the Defendant has the right to prohibit the Plaintiff from giving his neighbors any form of "handout" to reinforce his oral request for their votes. Once again, the court has no difficulty in finding that this restriction is unreasonable. The only handout utilized by the Plaintiff in connection with his 1997 door-to-door campaign was a card less than three inches by four and one-half inches in

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[1] The Plaintiff now admits that he did transgress a proper rule of the Housing Authority by pasting a bumper sticker to the front door of his apartment. Bumper stickers are notoriously hard to remove from any surface, and this could be classified as defacing property. The Defendant is free to prohibit the Plaintiff or any one else from engaging in this particular conduct.

size, urging the recipient to "Elect Jesus (Chuy) De La O" to the city council (Plaintiff's Exhibit 3). According to Director Alvarado, the prohibition against distribution of this tiny card by the Plaintiff was necessary to prevent "blight". Director Alvarado was forced to admit, however, that the complex's residents' association was permitted not only to endorse political candidates, but to distribute leaflets door-to-door within the complex. The great weight and preponderance of the evidence was to the effect that personal door-to-door campaigning by a candidate is a valuable campaign tactic, but that it is greatly enhanced by the ability to leave a physical tangible thing with the resident who is contacted. A Housing Authority rule purporting to impose a blanket prohibition against the Plaintiff handing his neighbor any form of campaign material whatsoever, including a tiny card, runs afoul of the First and Fourteenth Amendments. Such a rule would be neither reasonable nor viewpoint neutral, in view of the fact that the residents' association is permitted to distribute literature door-to-door, and that this literature may endorse a political viewpoint, and, on occasion, a political candidate. In these respects, therefore, the Plaintiff is entitled to the injunctive relief that he seeks.

Since the Defendant's action in 1997 deprived the Plaintiff of his First and Fourteenth Amendment rights to political speech and expression, he is entitled to recover damages pursuant to 42 U.S.C. § 1983. While it is relatively easy to find that the Plaintiff is entitled to recover some damages, it is much more difficult to calculate the proper amount of such damages. The trial evidence indicates that in March, 1997, 221 registered voters resided in the Sun Plaza Complex. Because of the actions of the Defendant, the Plaintiff was denied the opportunity to

contact the 220 registered voters other than himself to request their support. On the other hand, it in undisputed that 220 additional votes would have been insufficient to put the Plaintiff in a runoff. In other words, he finished third in the city council race, and he would have finished third even with 220 more votes. Nevertheless, the Court has found that the Defendant's actions deprived the Plaintiff of a very important constitutional right. The Plaintiff is entitled to compensation for his loss, intangible though it may be. The Defendant should be ordered to pay damages of $10.00 per registered voter, for a total of $2,200.00. The Defendant should further, be ordered to pay the Plaintiff's attorney's fees and costs.

It is therefore ORDERED that the Defendant be, and it is hereby, PERMANENTLY ENJOINED from preventing the Plaintiff from going door-to-door within the Sun Plaza Complex, speaking to the other tenants about his candidacy for office, and offering a piece of political material to each tenant.

It is further ORDERED that the Defendant be, and it is hereby, PERMANENTLY ENJOINED from preventing the Plaintiff from placing a political sign or placard in the window of his own apartment so long as he is a legal resident of the Sun Plaza Complex.

It is further ORDERED that the Plaintiff do have and recover of and from the Defendant damages in the amount of $2,200.00, plus his reasonable attorneys' fees and costs.

It is further ORDERED that the Plaintiff's attorneys file their motion for attorneys' fees and expenses, supported by appropriate affidavits and supporting documents, within fourteen days of the date of the judgment in this case.

SIGNED AND ENTERED this 11th day of February, 1999.

/s/ Harry Lee Hudspeth
HARRY LEE HUDSPETH
UNITED STATES
DISTRICT JUDGE

State of Texas)
El Paso County)

AFFIDAVIT

BEFORE ME PERSONALLY APPEARED, DAVID R. MARQUEZ, who after being sworn deposed and said:

"My name is David R. Marquez, I am over 21 years of age, a citizen of El Paso County, Texas. I am mentally competent and have personal knowledge of the following facts:

1. I am currently employed as the V.I.T. Enforcement Director for the County of El Paso, Texas.

2. I was employed as an officer with the El Paso County Sheriff's Department from 1979 to 1984. I worked my way up the ranks eventually obtaining the rank of Captain.

3. From 1984 to 1992, I worked for the Office of Special Investigations for the United States Air Force and the United States Department of Defense.

4. From 1992 to November of 1995, I was employed with The Housing Authority for the City of El Paso as Director of Admissions and Lease Enforcement.

5. I am aware and have read of Rules D.2. and D.5. of the Housing Authority of The City of El Paso. In my experience, the candidates for office have always been considered legitimate business in the Housing Authority premises.

6. The exercise of a person's right to be informed about political matters and religious

matters have always been considered legitimate activities and the persons who are purveyors of said information have always been considered legitimate such as candidates and their volunteers.

7. The doorstep, the sidewalk and the yard of the tenant have always been considered part of the leasehold where the tenant and not the Housing Authority exercises their domain. These areas are part of their "castle".

8. The Housing Authority of the City of El Paso Community and Resident Rules for Pubic [sic] Housing Program and Section 8 New Construction Program B. 12 E., and F., evidences the areas that belong to the tenant.

9. Additionally, the tenant is responsible for the cleanliness and maintenance of his front doorstep, his yard and his sidewalk failure to keep areas cleaned and maintain may result in penalties including eviction.

10. Political participation such as door to door campaigning has always been a healthy endeavor for the residents as it always promotes the democratic ideals of our country and helps the residents feels more like part of the electoral system.

11. Even those residents that do not vote because they are ineligible due to their not being citizens of this county get involved and help in the campaign, and in doing so instill in their children the American way of life.

12. It has been my experience that residents that get involved in political participation are more productive citizens and serve to

improve the quality of life in the ~~projects~~ [housing communities /s/ DRM] for all tenants.

13. It has also been my experience that the youth that get involved in political activity are more productive and help improve the quality of life in the ~~projects~~ [housing communities].

14. It has been my experience that door to door solicitation whether political, religious, or commercial has never resulted in any criminal activity.

15. The prohibiting against door-to-door solicitation is a very demeaning rule that imposes a double standard of first amendment rights to tenants.

16. This rule against door-to-door solicitation strikes at the heart of our electoral system and at the core of our democracy.

17. I have read the affidavit of Ned Beamon. The assertion by Ned Beamon that the elderly are especially fearful of door-to-door solicitations is not true and at best an exaggeration.

18. The elderly are the highest voting age group in the projects. Most welcome door to door solicitation by candidates and are willing listeners and participants since they usually have many issues such as social security and medical and nutritional services to consider and it is of paramount importance that they know their candidates and how they stand on these issues since they have so much at stake

19. As the Director of Admissions and Lease Enforcement for Housing, the respect for a person's privacy was always honored.

20. Requiring anyone to register and seek a permit for distributing literature would destroy the privacy of the individual. This would create a chilling effect on those residents that would like to obtain support for changing a rule of the Housing Authority because they might fear economic or official retaliation or social ostracism.

21. The assertions of crime stated in the affidavit of Ned Beamon are out of context. There is absolutely no link between crime and door-to-door political activity.

22. Further more, even if the candidates or their volunteers were to register before being allowed to go door-to-door, it is highly unlikely that someone intent on committing crimes in the premises of the Housing Authority would first register with the authorities for permission to enter the premises.

23. It is my understanding that Carlos Leon, El Paso City Police Chief, and El Paso County Sheriff Samaniego have ~~recently~~ [/s/ DRM] declared El Paso, Texas, among the "safest" cities in the country.

24. The assertion by Mr. Beamon that the premises of the Housing Authorities are involved in the movement of undocumented aliens is a highly exaggerated statement that has little or no basis in fact. It is highly doubtful that any nexus or correlation between candidates,

religious proselytizers, or commercial solicitors exists with any crime prevention concern, or and illegal immigration concern.

25. I am aware of the structure of the Housing Authority and I know that any policy regarding door-to-door solicitation can be changed at any time since the composition of the board is made up of political appointments.

26. Just as easy as the policy imposing the door-to-door prohibition can be changed, the same board or a different board can once again change it.

27. Because the door-to-door ban is capable of being reinstated by this same board or another board, only a permanent injunction prohibiting the Housing Authority from imposing restrictions on door-to-door campaigning can assure that the Housing Authority in the future will not infringe on the tenant's right to protected political, religious, and other protected speech.

28. Tenants in reality have no choice but to sign any regulation the board puts into effect. Failure to agree to any new contractual condition will in all probability lead to eviction.

29. Tenants qualify for housing by proving their ~~poverty~~, [low income /s/ DRM] as such the opportunity for challenging any regulation is virtually impossible.

30. There are approximately 40 housing units managed by HACEP, and a population of approximately 50,000 individuals.

31. The power that a Project Manager wields is enormous. Eviction for people in the projects

results in extreme hardship, many times leaving people homeless, or relegated to the colonias, areas of the county where no water utilities are available to the homeowners.

32. The fear of eviction causes tenants to fear exercise of their rights, including petitioning for anything that the tenant fears will not suit the Project Manager.

33. Thus the very fact that a tenant must obtain prior approval for handing out leaflets creates a chilling effect on a great majority of the tenants.

/s/ David R. Marquez
DAVID R. MARQUEZ

Signed before me by David R. Marquez on this 29th day of Oct., 2002.

/s/ Ruby Ann Valdez
Notary public, in and for
the State of Texas

RUBY ANN VALDEZ
NOTARY PUBLIC
(SEAL) in and for the State of Texas
My commission expires
May 16, 2005

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS

EXHIBIT ___

DEFENDANT HOUSING AUTHORITY'S RULE
REGARDING NOTICES AND FLYERS

* * *

VENUE

5. All the parties live and work in El Paso, El Paso County, Texas. All the events herein occurred in El Paso County, Texas.

FACTS

6. The Plaintiffs lease their own apartments from the Defendants.

7. The apartments are owned by the Housing Authority of the City of El Paso, (hereinafter HACEP).

8. The Defendant has two rules that in effect deny Plaintiffs their full use and enjoyment of their property under their lease depriving them of due process and equal protection under the law.

9. The Defendant's rules prohibit door to door solicitation and works to and intends to ban all political candidates and other first amendment protected activity such as religious door to door solicitation depriving Plaintiffs of their rights, and all those similarly situated, to receive information from political candidates and other religious groups and in doing so violating [sic] their guaranteed to them by the First Amendment to the United States Constitution.

10. The regulations now in effect are as follows:

Housing Authority of the City of El Paso, *Community and Resident Rules for Public Housing and Section 8 New Construction Program*, Rule D2.

> Trespassing. The development premises are for the exclusive use and enjoyment of the residents, members of their households, their guests and visitors, and such other persons who have legitimate business on the premises, e.g., law enforcement and other governmental personnel, utility service workers, HACEP contractors, and others as authorized by HACEP. All other persons will be regarded as trespassers subject to prosecution as allowed by state or municipal ordinance.
>
> Any person who desires access to any development premises and any person found on the walks, ways, playgrounds, parking lots, drives and other common areas of the development premises will be required by any law enforcement or HACEP personnel to identify himself or herself and to prove authority to be on the development premises. Any person who refuses to provide personal identification or cannot show authority to be on the development premises will receive a 'trespass warning' ordering the person to leave the development premises or be subject to arrest and prosecution to the extent permitted by state law or municipal ordinance.
>
> Any person, observed by law enforcement or HACEP personnel violating any HACEP rule, or federal, state or municipal law, regulation, or ordinance will be ordered by law enforcement or HACEP personnel to leave the development premises.

Housing Authority of the City of El Paso, *Community and Resident Rules for Public Housing and Section 8 New Construction Program*, Rule D5.

Notices and Flyers. HACEP does not allow door-to-door sales. If a resident desires to distribute notices or flyers in his development, the resident must obtain advance approval of the Development's Housing Manager and provide the Housing Manager with a copy of the proposed notice or flyer. A resident may not distribute a notice or flyer before 9:00 a.m. or after 8:00 p.m. Under no circumstances will a notice or a flyer be left in plain view on a resident's door if a resident of the unit is not at home or declines to answer the door. A resident distributing such flyers or notices must do nothing to allow the flyers or notice to become litter or which would disrupt the peaceful use and enjoyment of the other residents in the development or the residents' use of common areas.

11. Reference is made to the affidavit filed herein by plaintiffs and attached to this petition for further particular facts of this matter.

CAUSE OF ACTION NUMBER ONE

12. The Plaintiffs incorporate paragraphs 6 through 11 herein by reference for all purposes as if the same were set out at length. Plaintiff would further allege that the above acts by the Defendants are done so under color of law.

13. The Plaintiff would show the court that the Defendant's policy as set out in paragraph 10 is a violation of free speech, guaranteed to the plaintiff by

* * *

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS

EXHIBIT ___

AMENDED RULES OF HOUSING AUTHORITY
REGARDING NOTICES AND FLYERS

REVISION FOR ALL HACEP LEASES AND COMMUNITY RULES

Notices and Flyers. HACEP does not allow door-to-door sales. If a Tenant desires to distribute notices or flyers in his development, the Tenant must, in advance, give the development's Housing Manager notice that he/she will be distributing notices or flyers in the complex. Flyers may be distributed only between the hours of 9:00 A.M. and 8:00 P.M. **Flyers may not be distributed before 9:00 A.M. or after 8:00 P.M.** Under no circumstances will a notice or a flyer be left in plain view on a Tenant's door if a Tenant is not at home or declines to answer the door. A Tenant distributing such flyers or notices must ensure that the flyers or notices do not become litter or disrupt the peaceful use and enjoyment of the other Tenants in the development or the Tenant's use of the common areas.

Political and Religious Activities. Any person, whether a Tenant or a non-resident, has the right to enter any HACEP development complex for purposes of engaging in political and/or religious activities, including door-to-door political campaigning and/or religious activities. A non-resident of a complex wishing to enter a HACEP development complex for such purposes must provide advance written or telephonic notice to the complex manager's office or the central administrative offices (5300 E. Paisano Dr., El Paso, Texas 79905; 915-849-3820). It is the

individual's responsibility to ensure that advance notice is given prior to 5:00 p.m. on Friday for any activities to take place during the weekend in that administrative and complex managers' offices are closed during this time period. Any door-to-door activities must be carried out between the hours of 9:00 a.m. and 8:00 p.m.

MEETING HELD BY THE BOARD OF COMMISSIONERS OF THE HOUSING AUTHORITY OF THE CITY OF EL PASO, TEXAS ON APRIL 28, 2004.

RESOLUTION NO. 1226

The following resolution was introduced by Chairman Yellen read in full and considered.

WHEREAS, The Board of Commissioners of the Housing Authority of the City of El Paso, Texas approved resolution amending the Public Housing Admissions and Occupancy Policy, the Section 8/New Construction Administrative Plan and the Farm Labor Housing Management Plan to include a policy regarding political and religious campaigning.

After discussion Commissioner Escobar moved that the resolution be adopted as introduced and read. The motion was seconded by Commissioner Stillinger and on roll call the following vote was recorded.

AYES: Commissioners Romero, Escobar, Vilchis, Stillinger, and Yellen.

NAYS: None.

The Chairperson thereupon declared the motion carried and the resolution adopted.

ATTEST:

/s/ Rudolf Montiel
Secretary

RESOLUTION NO. 1226

RESOLUTION AMENDING THE PUBLIC HOUSING ADMISSIONS AND OCCUPANCY POLICY, THE SECTION 8/NEW CONSTRUCTION ADMINISTRATIVE PLAN AND THE FARM LABOR HOUSING MANAGEMENT PLAN TO INCLUDE A POLICY REGARDING POLITICAL AND RELIGIOUS COMPAIGNING [sic].

WHEREAS, the Housing Authority for the City of El Paso, Texas (HACEP), desires to give the residents an opportunity to receive solicitation from political and religious groups within reason; and

WHEREAS, the HACEP has amended the Public Housing Admissions and Occupancy Policy, the Section 8/New Construction Administrative Plan, and the Farm Labor Housing Management plan to incorporate guidelines for political and religious solicitation: and

WHEREAS, the proposed amendments were presented for a 30 day comment period on March 1, 2004, and any comments received were reviewed and incorporated into the amendment where applicable; and

WHEREAS, the HACEP would like to start implementing the amendment on May 1, 2004.

NOW THEREFORE BE IT RESOVED [sic], by the Board of Commissioners of The Housing Authority of the City of El Paso, that the amendment to section 19 of the Public Housing Admissions and Occupancy Policy be and hereby is approved for implementation.

PASSED AND APPROVED, this 28th day of April, 2004.

THE HOUSING AUTHORITY OF THE CITY OF EL PASO, TEXAS

/s/ Steven Yellen
Steven Yellen, Chairperson

ATTEST:

/s/ Rudolf Montiel
Rudolf C. Montiel, P.E., Secretary

State of Texas)

El Paso County)

AFFIDAVIT

BEFORE ME PERSONALLY APPEARED, ROSALINA DE LA O, who after being sworn deposed and said:

"My name is Rosalina De La O, I am over 21 years of age, a citizen of El Paso County, Texas. I am mentally competent and have personal knowledge of the following facts:

1. I reside in The Sun Plaza Housing Projects, a unit of the Housing Authority for the City of El Paso;

2. I have be [sic] a resident of the El Paso Housing Authority for more that [sic] 10 years.

3. Over the years my neighbors have subscribed to The El Paso Times Newspaper. The paper is delivered to their front door by an employee of the El Paso Times. I note that the person who collects for the paper goes door to door in the project, and is neither a resident of the project or an employee of the project. I have been told that such deliver [sic] of the paper is an approved action.

4. Over the years I have often been approached by a knock on the door by persons who were either personally running for elective office, or were the representative of such persons. I have spoken with them as to the issues of the election, and the qualifications of the candidates. I have often based my voting on such encounters, and value them highly as a personal source of quality information about an election that cannot be gotten by any other means.

5. I know many people in El Paso who do not live in the projects. I have noted that they still get the advantage of such personal encounters, and I know that I am being deprived of this highly valuable and unique source of election information as I live in government housing, which has been denying me the access to door to door election solicitation. Not being accessible to the candidate in a door to door method diminishes the value of my vote because it becomes more burdensome to solicit my vote and therefore causes candidates not to seek our vote and deny us input into the political discussion.

6. I have been a keen observer of the local election process, I often assist candidates for elective office. It is my considered judgment that the ban on door to door solicitation is an aid to those person [sic] running s [sic] republican for the following reasons:

   a. The projects are overwhelmingly democratic voters

   b. The most effective way of getting out the democratic vote is by door to door solicitation

   c. Republicans have rarely approached me in the past, while democratic candidates have often done so.

7. In order to qualify to live in HACEP housing it was necessary for me to establish my poverty. I believe this regulation discriminates on those who live in the projects because it deprives of an opportunity, that of meeting the candidates. given to other people that live outside public housing.

8. This rule also keeps persons wishing to approach me to share their religious beliefs from knocking on the door and I believe it violates my first amendment

rights to free speech and religion and other information.

9. I have always been responsible for whatever happens in my front porch and doorstep. It is in my contract that I have the rights to this area.

10. I believe that the rules keeping persons from approaching me and knocking on my doorstep is a violation of my property rights in my contract and leasehold agreement.

11. I have been damaged by not being able to receive candidates and other persons at my door because it interferes with the information I am unable to get because I am unable to move about to seek all the candidates that are running for office.

12. I have never experienced persons volunteers posing as political candidates or their volunteers and engaging in criminal activity in the premises of the Housing Authority.

13. The categorizing of political candidates as not "legitimate" is unreasonable because they can register like all other visitors with the person in charge of monitoring the visitors to check their credentials for authenticity.

14. By checking their credentials they may avoid any concerns they may have for crime.

15. The crime in this area is not any different from any other part of the city.

16. I am and have been involved in fighting for the civil rights of tenants in HACEP.

17. Currently the Residents Council of the HACEP is manipulated by HACEP and some politicians serve the interests of a few politicians to the exclusion of

the opposition. Therefore, only the candidates that are favored by the power structure are invited to speak to the council depriving residents of their right to meet other candidates.

18. Persons who are not in favor of the candidates or voice opposition to the candidates preferred by the Residents Council risk the possibility of eviction.

19. Only by allowing all candidates the freedom to go door to door will residents get the opportunity to make a free choice.

20. This deprives the minority of their rights of free speech and free political participation.

/s/ Rosalina De La O
Rosalina De La O

Signed before me the undersigned authority on this 1st day of October, 2002.

[SEAL] RUBY ANN VALDEZ
NOTARY PUBLIC
In and for the
State of Texas
My commission expires
MAY16 2005

/s/ Ruby Ann Valdez
Notary Public,
In and for the
State of Texas

State of Texas)

El Paso County)

AFFIDAVIT

BEFORE ME PERSONALLY APPEARED, ROSALINA DE LA O, who after being sworn deposed and said:

"My name is Rosalina De La O, I am over 21 years of age, a citizen of El Paso County, Texas. I am mentally competent and have personal knowledge of the following facts:

"I have been presented this contract by Bernie Rodriguez, Sun Plaza Project Manager, and Linda Pena, Assistant Sun Plaza Project Manager, and it contains provisions C2, C6 and C7 which reads as follows:

C2

Trespassing. The development premises are for the exclusive use and enjoyment of the Tenants, members of their households, their guests and visitors, and such other person [sic] who have legitimate business one [sic] the premises, e.g., law enforcement and other governmental personnel, utility service workers, HACEP contractors, and others as authorized by HACEP. All others [sic] persons on the development premises will be regarded as trespassers subject o [sic] prosecution as allowed by state law or municipal ordinance. Any person who desires access to any development premises and any person found on the walkways, playgrounds, parking lots, driveways and other common areas of the development premises will be requested by any law enforcement or HACEP personnel to identify himself or

herself and to prove to the authority to be on the development will receive a "trespass warning" ordering the person to leave the development premises or be subject to arrest and prosecution to the extent permitted by state law or municipal ordinance. Any person observed by law enforcement to HACEP personnel violating any HACEP rule, or federal, state or municipal regulation or ordinance will be ordered by law enforcement or HACEP personnel to leave the development premises.

C6

Notice and Flyers. HACEP does not allow door-to-door sales. If a Tenant desires notices or flyers in the development, the Tenant must obtain advance approval of the Development's Housing Manager and provide the Housing Manger with a copy of the proposed notice or flyer. Flyers may be distributed Monday-Friday only, and between the hours of 9:00 a.m. and 8:00 p.m. Flyers may not be distributed before 9:00 a.m. or after 8:00 p.m. Under no circumstances will a notice or a flyer be left in plain view on a Tenant's door if a Tenant is not at home or declines to answer the door. A Tenant distributing such flyers or notices must ensure that the flyers or notices do not become litter or disrupt the peaceful use and enjoyment of the other Tenant's use of the common areas.

C7

Political Activity. Tenants may campaign for political candidates subject to the provisions for

passing out flyers in number 6 above. Any non-resident who wishes to engage in door-to-door political campaign activities must give advance written notice of 3 consecutive business days (Monday-Friday) to the development manager. Any door-to-door campaign activities must be carried out between the hours of 10:00 a.m. and 7:00 p.m., Monday through Saturday.

"These rules and regulations violate my 1st amendment rights and my contractual rights under the lease. I have been told that if I do not agree to this contract I may be evicted.

"All of this has caused me a great deal of pressure and has made me suffer a nervous state of emotions.

/s/ Rosalina De La O
Rosalina De La O

Signed before me the undersigned authority on this 16th day of December, 2002.

[SEAL] **RUBY ANN VALDEZ**
NOTARY PUBLIC
In and for the
State of Texas
My commission expires
MAY16 2005

/s/ Ruby Ann Valdez
Notary Public,
In and for the
State of Texas

STATE OF TEXAS)
COUNTY OF EL PASO)

AFFIDAVIT OF AURORA VALVERDE

"My name is AURORA VALVERDE and over the age of 18 years old. I reside in the City of El Paso, El Paso County, Texas, at 1221 San Antonio St. Apt. 117, El Paso, Texas. I am president of Residents Association of Sun Plaza, a housing unit of HACEP. I was duly elected on January, 2001, by the residents of Sun Plaza and will serve until December 2003. Currently there is a recall election against me to remove me as president of the resident association. The HACEP nor the Resident Association has not presented me with any formal charges. Yet the HACEP and the Resident Association (anonymously through unnamed tenants HACEP) passed out a notice of a recall notice to the residents of Sun Plaza by door to door. See attached exhibit "A"

On April 2, 2003, I as a courtesy I advised Linda Pena, Assistant Project Manger that I was going to leaflet the flyer herein contained as Exhibit "B". I did so in order to in order to defend my name. Later that day I was instructed by Linda Pena, to stop leafleting. She said that the order came from Bernie Rodriguez, Project Manager. Ms Pena did so in a threatening form.

This is a violation of my first amendment rights to communicate with my neighbors. I have been told that I need to first seek approval for the materials that I want to distribute to my neighbors. HACEP is retaliating against me for asking that they give us the money that was sent to us from HUD earmarked for educating the tenants on petitions and grievances that tenants may have.

The HACEP, through Maria Calixtro, employee of HACEP, is trying to get rid of me because they want to make sure they have cleared the path for candidates of their choice. In this case, Maria Calixtro, a mainstay and volunteer of Mayor Ray Caballero is trying to knock out all those that don't blindly follow her lead. This usually means having to blindly support the candidates of her choice.

On March 29, 2003, a Health Fair for the elderly was held, and while we were eating, Maria Calixtro came in with Mayor Caballero, Rodolfo Montiel, Executive Director of Housing, Charlie Garcia, Chairman of the Board of Directors for the Housing Authority, and then proclaimed that the Health Fair was brought about by the Mayor and proceeded to make a campaign speech and that we would get another "fiesta" on Mothers Day. They then gave us a $10.00 Walmart & Sams shopping card to all those in attendance. Mr. Caballero then made a campaign speech.

Although I am not necessarily against Mr. Caballero for Mayor, I am against the strong arm tactics of the Housing Authority via Maria Calixtro. On another occasion I was ordered by Maria Calixtro to call Joyce Feiner to say that I was president of the Residents Association and that I pledged my support for Mayor Caballero. As soon as I failed to comply with Maria Calixtro's directive, I became the target of removal as President of the Resident Association.

/s/ Aurora Valverde
Aurora Valverde

Subscribed and Sworn Before me on April 3, 2003, to certify which witness my hand and seal of office.

[SEAL] **RUBY ANN VALDEZ**
NOTARY PUBLIC
In and for the
State of Texas
My commission expires
MAY16 2005

/s/ Ruby Ann Valdez
Notary Public

In and for the
State of Texas

EXHIBIT A

Sun Plaza Public Housing Community Resident Association

NOTICE OF SPECIAL MEETING
TO BE HELD AT 3:00 P.M. ON Thursday, April 3, 2003

A special meeting of the Sun Plaza Public Housing Community Resident Association has been called for 3:00 p.m. on Thursday, April 3, 2003. The meeting will take place at the community room located at the Sun Plaza community.

The purpose of the meeting is to inform members of the Resident Association that a recall election will be held at 7:00 p.m. on Thursday, May 8, 2003. The purpose of the recall election will be to decide whether Aurora Valverde should be removed from office as President of the Resident Association. The recall election was requested by a group of 42 residents from the Sun Plaza community who signed a petition asking for a recall election.

Attached to this notice is a copy of the information to be discussed at the meeting on April 3th [sic]. All residents are welcome and encouraged to come to the meeting so that this matter can be discussed and any questions can be answered.

Asociacion de Residentes de la Comunidad de Albergue Publico de Sun Plaza

AVISO DE LA JUNTA ESPECIAL A REALIZARSE EL JUEVES 3 DE ABRIL DEL 2003 A LAS 3:00 P.M.

Una Junta Especial de la Asociacion de Residentes de la Comunidad de Albergue Publico de Sun Plaza se efectura el Jueves 3 de Abril a las 3:00 p.m. La junta se realizara en el cuarto de la comunidad (el "community room") en la comunidad de Sun Plaza.

El Proposito de esta junta sera el de info mar a la Asociacion de Residentes que una eleccion de Destitucion sera efectuada el dia Jueves 8 de Mayol del 2003 a las 7:00 p.m. El proposito de esta eleccion es el de determinar si Aurora Valverde debera ser destituida como la Presidente de la Asociacion de Residentes. La eleccion fue pedida por un grupo de 42 residentes de la comunidad de Sun Plaza que firmaron una peticion pidiendo la eleccion de destitucion.

Adjunto a este aviso se encuentra una copia de la informacion que se tratara en la junta del dia 3 de Abril. Todos los residents son bienvenidos a atender la junta para que se pueda platicar y tratar este asunto, asi como para responder a las preguntas de los residentes.

Sun Plaza Public Housing Community Resident Association

SUMMARY OF THE RECALL PETITION

A group of 42 residents from the Sun Plaza community has signed a petition asking for an election to remove Aurora Valverde as President of the Resident Association. The recall petition sets forth two general reasons why Ms. Valverde should be removed from office. First, the recall

petition asserts that Ms. Valverde has made threats against residents of Sun Plaza. The recall petition states that Ms. Valverde threatened to have residents removed from their residences with the Housing Authority if they did not join her group. Second, the recall petition asserts that Ms. Valverde has ignored certain groups of residents and their needs.

SAMPLE BALLOT

Sun Plaza Resident Association
Recall Election Ballot 2003

Are you in favor or opposed to removing Aurora Valverde as President of the Sun Plaza Community Resident Association. If she is removed from office as part of this recall election, an election, for a new President of the Resident Association will be held in approximately 30 days.

Check one of the following choices:

_____ In favor of recalling Ms. Valverde from office

_____ Opposed to recalling Ms. Valverde from office

Asociacion de Residents de la Comunidad de Albergue Publico de Sun Plaza

RESUMEN DE LA PETICION DE DESTITUCION

Un grupo de 42 residentes de la comunidad de Sun Plaza han firmado una peticion pidiendo una election pare la destitucion de Aurora Valverde como la Presidente de la Asociacion de Residentes. La peticion pidiendo is destitucion da dos razones en general por las cuales la Sra.

Valverde deberia de ser destituida. Primeramente, la peticion alega que la Sra. Valverde a amenazado a los residentes de Sun Plaza. La peticion alega que la Sra. Valverde a amenazado con remover a los residentes de la comunidad si no se unian a su grupo. Segundamente, la peticion alega que la Sra. Valverde a ignorado, ciertos grupos de residentes, asi como las necesidades de esos grupos.

MUESTRA DE LA MATRICULA DE VOTO

Esta usted en favor de o en contra de la destitucion de Aurora Valverde como la Presidente de la Asociacion de Residentes de la Comunidad de Sun Plaza. Si ella es destituida como la Presidente a raiz de esta eleccion de destitucion, una nueve eleccion pare elejir al Presidente de la Asociacion de Residentes sera conducida en aproximadamente 30 dias.

Por favor marque una de las siguientes opciones:

_____ En favor de la destitucion de la Sra. Valverde como Presidente

_____ En contra de la destitucion la Sra. Valverde como Presidente

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Sun Plaza Public Housing Community Resident Association

NOTICE TO ALL RESIDENTS OF SUN PLAZA REGARDING A RECALL ELECTION OF THE SUN PLAZA RESIDENT ASSOCAITION [sic] PRESIDENT

The Sun Plaza Public Housing Community Resident Association has received a petition asking for a recall

election to be held for Aurora Valverde, the President of the Sun Plaza Resident Association.

The Resident Association, with the technical assistance of the Housing Authority, has reviewed the recall petition and determined that it is valid petition. The recall petition was signed by 42 eligible voting members of the Resident Association. This represents more than 10 percent of the total eligible voting members of the Resident Association. The recall petition also sets forth issues which, if agreed by a majority of voters in the recall election, would constitute just cause for the removal of Ms. Valverde as President of the Resident Association. A summary of the recall petition, written in both English and Spanish, is attached for your reference.

The recall election will be held at 7:00 p.m. on Thursday, May 8, 2003. A sample ballot is attached for your reference. The issue to be decided in the recall election is whether Ms. Valverde will remain as President of the Resident Association or whether she should be removed from office for just cause.

The election will be held in the same manner as all other Resident Association elections. This means that each member of the Resident Association present at 7:00 p.m. on Thursday, May 8th will be entitled to case [sic] one vote whether or not to recall Ms. Valverde. A third-party independent monitor will be present to oversee the election.

Residents are free to discuss this recall election and campaign, subject to the rules of the Resident Association and Housing Authority. Please understand, however, that the Housing Authority has certain procedures which must be followed with respect to door-to-door campaigning and

the distribution of written materials and signs in the Sun Plaza community. The Housing Manager, Bernie Rodriguez, will be glad to assist any residents in order to help them comply with these procedures so they can campaign or distribute materials about this election.

Finally, please understand that the Housing authority does not take a position on how you should vote. The Housing Authority's only role in this matter is to provide technical assistance and oversight to the Resident Association as its [sic] processes this recall election.

We appreciate your consideration of this issue. If you have any questions about this matter, please direct your questions to Bernie Rodriguez, Housing Manager for the Sun Plaza community. Mr. Rodriguez will either answer your question or direct it to the proper person.

Associacion de Residentes de la Comunidad de Albergue Publico de Sun Plaza

AVISO A TODOS LOS RESIDENTES DE SUN PLAZA RELACIONADO CON LA ELECCION DE LA PRESIDENTE DE LA ASSOCIACION DE RESIDENTES DE SUN PLAZA

La Asociacion de Residentes de la Comunidad de Albergue Publico de Sun Plaza ha recibido una peticion pidiendo una eleccion buscando la desticion de Aurora Valverde, la Presidente de la Asociacion de Residentes de Sun Plaza.

La Asociacion de Residentes, con la asistencia tecnica de la Housing Authority, a revisado la peticion y se a determinado que la peticion es valida. La peticion fue firmada por 42 miembros, con derecho a voto de la Asociacion de

Residentes. Este numero representa mas del 10 por ciento del numero total de miembros con derecho a voto de la Asociacion de Residentes. La peticion tambien propone otros asuntos, que, si aprobados por la mayoria de los votantes en la eleccion, formarian la basis para la destitucion de la Sra. Valverde como Presidente de la Asociacion de Residentes. Un resumen de la Peticion pidiendo la destitucion, escrita tanto en Ingles como en Espanol, esta anadida a este documento.

La eleccion sera el dia Jueves 8 de Mayo del 2003, a last 7:00 p.m. Una muestra de la matricula de voto esta anadida a este documento. El tema a decidirse sera si la Sra. Valverde se mantendra como Presidente de la Asociacion de Residentes o si sera destituida.

Esta eleccion sera efectuada en la misma manera como cualquier otra eleccion de la Asociacion de Residentes. Esto significa que cada miembro de la Asociacion de Residentes presente a las 7:00 p.m. el Jueves 8 de Mayo, tendra derecho a efectuar un voto, ya sea a favor de o en contra de destituir a la Sra. Valverde, Un monitor independiente estara presente para vigilar y supervisar la eleccion.

Los Residentes tienen derecho a discuitir esta eleccion, asi como de emprender campanas para la misma, siempre y cuando sigan las reglas de la Asociacion de Residentes y de la Housing Authority. Sin embargo, es importante que esten consientes que la Housing Authority tiene reglas y procedimientos a seguir con respecto a campanas que van de puerta a puerta y en cuanto a la distribucion y uso de materials escritos, impreso o [illegible] en la comunidad de Sun Plaza. El Supervisor of Housing Manager, Bernie Rodriguez, asistra a los residentes que asi lo soliciten para

asegurar que operen bajo las reglas y procedimientos correctos para que puedan emprender campanas o distribuir materials acerca de esta eleccion.

Finalmente, es importante que entiendan que la Housing Authority no esta tomando ninguna posicion en cuanto a como deben de votar los Residentes. El unico papel de la Housing Authority es el de proveer asistencia tecnica y supervicion a la Asociacion de Residentes en cuanto a el procedimiento a seguir en esta eleccion.

Agradecemos su atencion a este asunto. Si tienen [illegible] pregunta sobre este asunto, por favor communiquense con Bernie Rodriguez, el Supervisor o Housing Manager para la comunidad de Sun Plaza. El Sr. Rodriguez respondera a sus preguntas o dudas, o diriga sus dudas a la persona adecuada para resolver sus preguntas y dudas.

EXHIBIT B

1 de Abril de 2003

Estimados miembros de la comunidad de Sun Plaza:

Me entere de que ustedes han recibido un aviso de parte del personal de la oficina promoviendo mi destitucion como su presidenta. Este aviso fue preparado por la administracion de Housing. Hace ya algunos dias yo me entere de que los abogados que trabajan para el señor Montiel y miembros de la administracion se han estado preparando para destituirme y los han usando a todos ustedes como pretexto. Aunque no me afecta el daño que ellos quieren causarme individualmente, si me afecta muchisimo que los utilizen a ustedes como escudo para desquitar su disgusto

hacia mi. Los lideres de Housing han actuando iresponsablemente y maliciosamente, sin siquiera imaginarse el conflicto que resultara entre todos nosotros aqui en nuestra comunidad. Como pueden ellos sentir los resultados del daño si ellos no viven aqui entre nosotros? Ellos son los que estan poniendonos a todos nosotros en contra y hasta se burlan y se divierten de ver la trifulca que han causado. En ese aviso ellos dicen que Housing no esta tomando lados, pero que nos dice el hecho de que ellos son los que han estado hablando con ustedes instigando este conflicto? En la ultima junta comunitaria del dia 25 de Marzo en la cual 48 de ustedes asistieron pacificamente y en repetidas ocaciones ustedes expresaron que no tenian quejas acerca de mi liderazgo y firmaron su nombre para validar esta junta, yo me pregunto; de donde viene toda esta insistencia por querer pelear??? Sabian ustedes que la administracion detesta que yo haga preguntas acerca de fondos y como y donde se estan gastando? Sabian ustedes que yo he reportado a las autoridades el malgasto y maluso de fondos por parte de los adminstradores? Sabian ustedes que yo asisto a las juntas de los comisionados y les digo lo que siento "sin pelos en la lengua"? Sabian ustedes que yo me opongo a las practicas sucias y deshonestas de los administradores y lo anuncio sin miedo a nadie? Sabian ustedes que esto a ellos no les satisface? Y por esas razones andan instigando utilizandolos a ustedes para atacarme a mi que soy parte de ustedes. Nosotros no somos pirañas, o animales que se odian, ni tampoco somos payasos para darles un show para su diversion. Yo les pido muy atentamente que piensen y hagan la decision que mas les convenga, pero no permitan que la ultima decision sea la que les daria satisfaccion a solamente un grupo de personas que estan llenos de maldad y rencor y no saben

como expresarlo humanamente. No permitan que estos individuos destruyan nuestra comunidad, ellos no viven

* * *

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
EL PASO DIVISION

ROBERTO S. VASQUEZ and JESUS DE LA O,	§	
Plaintiffs,	§	
v.	§	No. EP-00-CA-0089-DB
HOUSING AUTHORITY OF THE CITY OF EL PASO,	§	
Defendant.	§	

AFFIDAVIT OF NED BEMAN

STATE OF TEXAS §
§
COUNTY OF EL PASO §

BEFORE ME, the undersigned authority, personally appeared NED BEMAN, who being by me, duly sworn, deposed and states as follows:

1. My name is NED BEMAN. I am over the age of twenty-one (21), have never been convicted of a felony, and am otherwise legally qualified and fully competent to make this affidavit. I have personal knowledge of the facts related below and they are true and correct.

2. I work for the Housing Authority of the City of El Paso, and am the Director of Housing Management, having previously been Acting Director of Housing Management and, before that, Area Manager for the Central/West Area which includes the Sherman Complex. I am familiar with the Housing Authority rules and regulations pertaining to its tenants. I am also the

custodian of records of the Housing Authority policies and procedures that apply to Housing Authority tenants. These policies include the Community and Resident Rules, which are records kept in the ordinary course of the Housing Authority's business.

3. Attached are the Housing Authority's Community and Resident Rules, first promulgated on August 19, 1998 and modified on January 26, 2000. Rule D.2. was included in response to the decision of the U.S. District Court in the *De La O* v. *Housing Authority of the City of El Paso,* No. EP-98-CA-52-H, W.D. Tex., in which the absence of written rules regulating political activity was noted by the court as one of the reasons for its finding against the Housing Authority in that case. The subsequent changes to the rules do not affect Rule D.2., but are included.[1]

4. Rule D.2. is a "trespass after warning" rule and is intended to regulate the access of non-residents to Housing Authority tenants. Under this rule, access to Housing Authority property is limited to lawful residents, invited guests, and those conducting official business. By its terms, the rule permits any resident, including Plaintiff De La O, to invite political candidates, including Plaintiff, to his or her apartment for the dissemination of political views. The purpose of these rules is the protection and safety of the tenants, because a large majority of persons arrested on Housing Authority premises are non-residents, and because Housing Authority property is often used by non-residents to sell drugs, or, is involved in the movement of undocumented non-residents.

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[1] The changes reference distribution on notices and flyers. Rule D.5.)

5. After the rules and changes were promulgated, I issued a memorandum on March 15, 2000, regarding their application by Housing Authority employees, attached. This memorandum followed by correspondence with Mr. De La O , attached, in which I explained the Rule application and apologized for an earlier misunderstanding. No exceptions to the Community and Resident Rules have been made for any other candidates for public office, Rules D.2. and D.5. have been applied consistently and equally to all non-residents, as evidenced by earlier correspondence with candidate Cook and the El Paso Times, attached. Safety of the residents is the paramount concern of the Housing Authority. It is my experience that most arrests on Housing Authority property are of non-residents, and most incidents involving drugs on Housing Authority premises involve non-residents. Non-resident walk-through activity is especially high at the Sun Plaza Complex. The INS operates a surveillance station at Sun Plaza because the large number of undocumented aliens who pass through the Complex. Because of the elderly make-up of Sun Plaza, some residents are especially fearful of door-to-door solicitations.

6. All of the Housing Authority complexes are adjacent to streets and sidewalks owned by the City of El Paso. Some have streets and sidewalks within them, such as the Sherman Complex. At the Sun Plaza Complex, the perimeter is completely bounded by city streets and sidewalks. These streets and sidewalks are open to the public and would provide access for political candidates who seek to communicate with Housing Authority tenants.

Further, affiant sayeth not.

/s/ Ned Beman
NED BEMAN, Affiant

SUBSCRIBED AND SWORN TO BEFORE ME on this the 6 day of April, 2000.

[SEAL] JAMIE WALKER
-MY COMMISSION EXPIRES
December 16, 2002

/s/ Jamie Walker
Notary Public
In and For The
State of Texas

[LOGO] **HOUSING AUTHORITY**
OF THE CITY OF EL PASO, TEXAS

To: Management Staff

From: Ned Beman /s/ [illegible]
Director of Housing Management

Subject: Flyers

Date: March 15, 2000

Recently, we had a situation on [sic] of the complexes involving a resident who was told by a manager to stop distributing literature.

Please be reminded that the Community Rules regarding flyers and distribution of literature were amended in January of this year. Under the changes, residents and resident associations (not outside third parties) may distribute flyers or literature, so long as they comply with the neutral time, place and manner rules. In summary, those time, place and manner restrictions require that the resident:

1. Any resident wishing to pass out such literature or flyers simply needs to advise the complex manager ahead of time and provide the manager with a copy of the proposed notice or flyer. This ensures the manager knows exactly what is being circulated and when. This also allows the manager the opportunity to be aware of who may be going door-to-door in the event of questions or complaints from other residents.

2. Distribution is limited to the hours of 9 a.m. and 8 p.m.

3. Literature or flyers being distributed must be handed directly to the other person. The resident may not leave the literature or flyers in the door

if going door to door and a tenant fails to answer the door (which would advertise to thieves that there is no one at home).

4. A resident distributing such flyers or notices must not disrupt other residents' peaceful use and enjoyment of the development.

5. Finally, commercial solicitation remains prohibited. For example, residents may no [sic] be passing out grocery store flyers or the like.

You are reminded to review the new Community Rules and become familiar with them.

[LOGO] **HOUSING AUTHORITY**
OF THE CITY OF EL PASO, TEXAS

March 10, 2000
Hand-delivered

Mr. Jesus De La O
Sun Plaza Apartments, Apt. 88C
1221 E. San Antonio St.
El Paso, TX 79901

Re: *Distribution of Literature*

Dear Mr. De La O:

I apologize for the confusion yesterday regarding the distribution of literature. The Housing Authority of the City of El Paso, Texas recently revised the Community Rules to the lease to permit the residents or their association to distribute literature or flyers of a non-commercial nature. I have included a copy of the amended Community Rules, for your reference. Any resident wishing to pass out such literature or flyers simply needs to advise the complex manager ahead of time and provide the manager with

a copy of the proposed notice or flyer. This ensures the manager knows exactly what is being circulated and when. This also allows the manager the opportunity to be aware of who may be going door-to-door in the event of questions or complaints from other residents.

Distribution is limited to the hours of 9 a.m. and 8 p.m., and the literature or flyers being distributed must be handed directly to the other person. In no event shall any literature be left on or in doors to advertise that any resident is not home. Finally, a resident distributing such flyers or notices must do whatever is necessary to prevent any disruption of the peaceful use and enjoyment of the other residents in the development.

Please coordinate with the manager of the Sun Plaza Apartments so that there is no misunderstanding about the application of the Community Rules. If you have any other questions or problems, please do not hesitate to call me at 849-3820.

Very truly yours,

/s/ Ned Beman
Ned Beman
Director, Housing
Management

Encl: as

cc: Pablo Puente
I. P. Herrera

[LOGO] **HOUSING AUTHORITY**
OF THE CITY OF EL PASO

March 29, 1999

John Cook Campaign
5105 Branon
El Paso, Texas 79824

Dear Mr. Cook:

Please be aware, the Housing Authority for the City of El Paso (HACEP) does not permit the distribution of flyers or solicitation on HACEP property. I have been advised that your campaign has been distributing flyers at the Eisenhower and Roosevelt Complexes. This activity is not permitted and must be stopped immediately. In the Community and Resident Rules it is stated:

> Notices and Flyers. The HACEP does not permit the placing of any type of placard or sign, or distribution of any literature, for whatever purpose, on HACEP property; except for flyers which may be placed on designated bulletin boards by the residents informing other residents of Resident Association activities related to their tenancy at HACEP.
>
> Trespassing. The development premises are for the exclusive use and enjoyment of the residents, members of their households, their guests and visitors, and other persons who have legitimate business on the premises, e.g., law enforcement and other governmental personnel, Utility service workers, HACEP contractors, and others as authorized by HACEP. All other persons on the development premises will be regarded as trespassers subject to prosecution as allowed by state law or municipal ordinance.

The above rules are being enforced through out the HACEP properties.

Please contact me at 849-3857 if you have any questions.

Sincerely,

/s/ Ned Beman
Director of Management, Interim

cc: Ma Luisa Hernandez, Manager at Eisenhower
Rose Flores, Manager at Roosevelt

Revised November 15, 2001

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 00-50702

ROBERTO S. VASQUEZ; ET AL,

Plaintiffs,

JESUS DE LA O,

Plaintiff-Appellant

versus

HOUSING AUTHORITY OF THE CITY OF EL PASO,

Defendant-Appellee.

Appeal from the United States District Court
for the Western District of Texas

November 5, 2001

Before POLITZ and BARKSDALE, Circuit Judges, and FALLON,[1] District Judge.

POLITZ, Circuit Judge:

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[1] Honorable Eldon E. Fallon, United States District Judge for the Eastern District of Louisiana, sitting by designation.

Jesus De La O appeals an adverse summary judgment in his action challenging the El Paso Housing Authority's enforcement of a trespassing regulation against candidates engaged in door-to-door campaigning. Concluding that the restriction, as applied to nonresident political volunteers, violates the first amendment, we reverse and remand.

BACKGROUND

De La O resides in the Sun Plaza Apartments, a housing unit owned by the Housing Authority of the City of El Paso ("HACEP"). Roberto Vasquez, a candidate for El Paso County Democratic Chair, sought to distribute literature and to engage in door-to-door campaigning at Sherman Oaks, another HACEP development. Vasquez does not reside in any HACEP facility. HACEP informed Vasquez that he could not campaign on any housing authority property, citing two regulations. The first regulation, commonly known as a "trespass after warning" rule, limits access to HACEP property to "residents, members of their households, their guests and visitors, and such other persons who have legitimate business on the premises, e.g., law enforcement and other governmental personnel, utility service workers, HACEP contractors, and others as authorized by HACEP."[2] Persons refusing to identify themselves or those who cannot prove authority to be on the development premises are to receive a "trespass warning" ordering them to leave or face arrest.

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[2] Housing Authority of the City of El Paso, *Community and Resident Rules for Public Housing and Section 8 New Construction Program*, Rule D2.

The second regulation, entitled "Notices and Flyers," prohibits the distribution of such materials without prior approval of the Development's Housing Manager. It allows residents to distribute literature only between 9:00 a.m. and 8 p.m. and forbids the placing of leaflets on the doors of residents who do not answer.[3] Taken together, these regulations operate to allow residents to distribute literature, political or otherwise, but prevent nonresidents from doing so. The Director of Housing Management stated in his affidavit that the trespass after warning rule protects tenants in that most persons arrested on the premises are nonresidents.

The De La O and Vasquez action challenges the regulations restricting nonresident access. The trial court issued a Temporary Restraining Order enjoining HACEP from preventing Vasquez and other candidates from campaigning on HACEP's property until a final hearing could be held. That hearing followed and the parties filed dispositive motions. HACEP moved to dismiss the action and, alternatively, for summary judgment. De La O and Vasquez responded by filing their own motions for summary judgment. The trial court entered final judgment granting HACEP's motion for summary judgment. In its Memorandum Opinion and Order the court found that the housing development was a non-public forum and that the regulations were a reasonable response to relevant safety concerns. De La O appealed, asserting his constitutional right to receive oral and written presentations from political candidates or their representatives.

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[3] *Id.*, Rule D5.

ANALYSIS

We review a summary judgment *de novo,* affirming if there is no genuine issue of material fact and the movant is entitled to judgment as a matter of law.[4] The parties do not dispute the facts and ask us to decide the purely legal issue whether the HACEP regulations violate the first amendment. We conclude that the regulations, as applied to political campaigners and their representatives, constitute an unreasonable restriction on De La O's first amendment right to receive political information.

I. Right to Receive Information Protected Under First Amendment

We will address the question of the propriety of a challenged regulation, such as that at bar, if the activity at issue implicates the first amendment. HACEP contends that the present dispute raises no first amendment concerns because De La O, the only remaining appellant, resides in the development and may proceed door-to-door espousing his political views. We are not persuaded; there is more to the inquiry. The first amendment guarantees the unrestricted flow of information into the market place of ideas. This first amendment protection extends not only to those who contribute to the market place of ideas, but necessarily extends to those who seek to benefit from the resultant dialogue. As stated by the Supreme Court:

> The authors of the First Amendment knew that novel and unconventional ideas might disturb the complacent, but they chose to encourage a freedom which they believed essential if vigorous

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[4] *Harris v. Rhodes,* 94 F.3d 196 (5th Cir. 1996).

> enlightenment was ever to triumph over slothful ignorance. This freedom embraces the right to distribute literature, and necessarily protects the right to receive it.[5]

II. Forum Analysis

After finding that the activity at issue implicates the first amendment, "we must determine the level of scrutiny that applies to the regulation of protected speech at issue."[6] The Supreme Court recognizes three different categories of government owned property for purposes of the first amendment: the traditional public forum, the designated public forum, and the nonpublic forum.[7] Traditional public fora include "those places which 'by long tradition or by government fiat have been devoted to assembly and debate,'" such as public streets and parks.[8] Designated public fora encompass those places or channels of communication assigned by the government "for use by the public at large for assembly and speech, for use by certain speakers, or for the discussion of certain subjects."[9] Finally, nonpublic fora consist of those places "which [are]

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[5] *Martin v. City of Struthers*, 319 U.S. 141, 143 (1943) (citations omitted).

[6] *United States v. Kokinda*, 497 U.S. 720, 725 (1990) (plurality opinion).

[7] *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37 (1983).

[8] *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 802 (1985) (quoting *Perry*, 460 U.S. at 45).

[9] *Id.* (citing *Perry*, 460 U.S. at 45-46 and n.7).

not by tradition or designation a forum for public communication."[10]

We agree with the district court that the HACEP developments fall within the category of nonpublic fora.[11] Residency is limited to those who meet the financial qualifications and the developments lack public streets and parks. In addition, although the residents use the housing complex for myriad everyday life activities, including the discourse on ideas and the discussion of any topic they desire, the government did not create HACEP nor its developments for the purpose of providing a meeting place for the public to exchange ideas. Rather, the purpose of the HACEP development activity is to provide affordable housing to low income citizens who reside in El Paso. This necessarily mandates a finding that the HACEP developments differ in character from the areas previously categorized by the Court as designated public fora.[12]

We recognize that HACEP shares many similarities with the government town at issue in *Tucker v. State of Texas*,[13] where the Court held that a village owned by the United States and designed to provide housing for persons

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[10] *Perry*, 460 U.S. at 46.

[11] *See also Daniel v. City of Tampa*, 38 F.3d 546 (11th Cir. 1994) (finding that Florida's housing complexes are nonpublic fora).

[12] *See, e.g., Widmar v. Vincent*, 454 U.S. 263 (1981) (finding university facilities a designated public forum with first amendment rights of equal access to students); *City of Madison Joint Sch. Dist. No. 8 v. Wis. Employment Relations Comm'n*, 429 U.S. 167 (1976) (finding school board meeting a designated public forum with respect to issues relating to operation of district's public schools).

[13] 326 U.S. 517 (1946).

engaged in National Defense activities could not ban religious activities within its boundaries. Unlike Tucker, however, HACEP operates only a small web of housing complexes within a large urban area, it does not control every building and walkway in the city of El Paso. A more telling comparison is the military base at issue in *Greer v. Spock*.[14] The base permitted free civilian access to certain unrestricted areas, however, "[t]he presence of sidewalks and streets within the base did not require a finding that it was a public forum."[15] Characterizing HACEP as a public forum simply because of its streets and sidewalks, as appellant urges, would be inconsistent with our understanding of the Court's forum analysis jurisprudence. As the Court clearly has noted: "The mere physical characteristics of the property cannot dictate forum analysis."[16] The developments operated by HACEP, as we view them, fall within the category of nonpublic fora.

III. Constitutionality of the Ho··ing Authority Regulations

The determination that the HACEP developments are nonpublic fora does not end our inquiry. We must evaluate the regulations at issue under the standard established by the Court for restrictions on speech in nonpublic fora. The government may regulate expressive activities in a nonpublic forum "as long as the regulation on speech is reasonable and not an effort to suppress expression merely

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[14] 424 U.S. 828 (1976).

[15] *United States v. Kokinda*, 497 U.S. 720, 727 (1990) (citing *Greer v. Spock*, 424 U.S. 828, 835-37 (1976)).

[16] *Id.*

because public officials oppose the speaker's view."[17] We recognize that the "First Amendment does not guarantee access to property simply because it is owned or controlled by the government."[18] An equally commanding principle, however, is that "[t]he Government, even when acting in its proprietary capacity, does not enjoy absolute freedom from First Amendment constraints."[19] Applying the aforementioned standard to the present dispute, we conclude that the trespass after warning statute, as applied to political candidates, constitutes an unreasonable restriction on the residents' first amendment rights.

A. Viewpoint Neutrality

We agree with the district court that Rules D2 and D5 are viewpoint neutral because they apply to all nonresidents who seek to go door-to-door distributing literature. HACEP proscribes door-to-door campaigning regardless of party affiliation or the viewpoint espoused by the nonresident. Accordingly, the regulations are content-neutral in our constitutional evaluation.

B. Reasonableness

With due pause and after careful consideration we disagree with trial court that Rules D2 and D5 constitute reasonable regulations when applied to political candidates and their campaign volunteers. The trespass regulation, as

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[17] *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 46 (1983).

[18] *United States Postal Serv. v. Greenburgh Civic Ass'ns*, 453 U.S. 114, 129 (1981).

[19] *Kokinda*, 497 U.S. at 725.

applied to political campaigning, strikes at the very core of our democratic system. "Mere legislative preferences or beliefs respecting matters of public convenience may well support regulation directed at other personal activities, but be insufficient to justify such as diminishes the exercise of rights so vital to the maintenance of democratic institutions."[20] For many individuals, door-to-door political volunteers provide the main or only link to the election process, especially with respect to local elections where candidates may lack the resources for extensive media campaigns. In recognizing the importance of political canvassing, the Supreme Court stated: "Of course, as every person acquainted with political life knows, door to door campaigning is one of the most accepted techniques of seeking popular support, while the circulation of nominating papers would be greatly handicapped if they could not be taken to the citizens in their homes. Door to door distribution of circulars is essential to the poorly financed causes of little people."[21] We do not reject HACEP's concern that non-residents commit the majority of crimes on development property, nor its belief that combating crime is a legitimate purpose for the trespass after warning regulation. We conclude, however, that the manner in which HACEP seeks to accomplish its goal of crime prevention is unreasonable under the circumstances herein presented.

As noted by the Court, "consideration of a forum's special attributes is relevant to the constitutionality of a regulation since the significance of the governmental

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[20] *Schneider v. State (City of Irvington)*, 308 U.S. 147, 161 (1943).

[21] *Martin v. City of Struthers*, 319 U.S. 141, 146 (citations omitted).

interest must be assessed in light of the characteristic nature and function of the particular forum involved."[22] HACEP operates housing developments, where people walk to and from their residences, talk with their neighbors, and generally conduct themselves like individuals in any other neighborhood in El Paso. As such, the citizens who reside in the HACEP developments deserve access to political information in the same manner as other citizens of El Paso. HACEP apparently acknowledges the importance of allowing political discourse because it concedes that De La O, a resident, can walk door-to-door expressing his views and distributing literature in support of any candidate. The sole qualification, compliance with the strictures in Rule D5,[23] poses a requirement that, if placed upon nonresident political candidates or volunteers, likely would remedy any safety concerns caused by unknown individuals campaigning at inappropriate hours.

We note with some focus that the record reflects that HACEP does not ban all nonresidents, as the trespass regulation does not apply to certain individuals. These include members' guests and visitors, and "such other persons who have legitimate business on the premises, e.g., law enforcement and other government personnel, utility service workers, HACEP contractors, *and others as authorized by HACEP.*" That the regulation lists certain groups as "examples" indicates to us that HACEP contemplates the

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[22] *Heffron v. Int'l Soc'y for Krishna Consciousness*, 452 U.S. 640, 650-51 (1981).

[23] Specifically, getting prior permission to distribute any notices or flyers from the Housing Manager at Sun Plaza and going door-to-door between the hours of 9 a.m. and 8 p.m.

existence of other groups, unmentioned in the regulation, who fall under the category of individuals with "legitimate business on the premises." We are persuaded beyond peradventure that the wholesale exclusion of political candidates and their volunteers from this category unreasonably and unnecessarily interferes with what may well be the primary connection between many of HACEP's residents and the democratic process.[24]

Finally, "[i]n considering legislation which thus limits the dissemination of knowledge, we must 'be astute to examine the effect of the challenged legislation'. . . ."[25] The effect of the trespass regulation, as applied in the matter before us, is to isolate a significant portion of the El Paso community from one of the most time-honored and effective means of political discourse. Although HACEP's outright ban on door-to-door campaigning by nonresidents is unreasonable, requiring political campaigners to seek the same authorization as other individuals that have "legitimate business on the premises" would be reasonable in light of HACEP's goals of preventing crime by nonresidents.

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[24] We note that HACEP uses a system, the specifics of which are not contained in the record, by which law enforcement officers make the determination of who to "warn" after asking for identification. The government personnel, utility service workers, etc., who qualify as having "legitimate business on the premises" must carry some type of identification to satisfy the officers that their presence on HACEP property is warranted. We can think of no reasonable explanation for barring political candidates from obtaining similar identification. If the checking of an individual's credentials by law enforcement officials serves as sufficient protection when allowing government personnel, contractors and others on to the premises, the same safeguards should provide ample security when dealing with political candidates and their representatives.

[25] *Martin*, 319 U.S. at 144 (quoting *Schneider*, 308 U.S. at 161 (1939)).

HACEP's Housing Managers need merely check to ensure that the campaign volunteer's credentials are valid. Such identification might properly be denied if the volunteer reasonably lacked sufficient credentials. This would provide an adequate balance between protecting residents from dangerous imposters and promoting political discourse: "While door to door distributors of literature may be either a nuisance or a blind for criminal activities, they may also be useful members of society engaged in the dissemination of ideas in accordance with the best tradition of free discussion."[26]

We recognize that in *Daniel v. City of Tampa*, the Eleventh Circuit reached an opposite conclusion with respect to a nearly identical statute, Florida Statute Chapter 810.09.[27] Our brethren concluded that Florida's housing authority complexes are nonpublic fora and that "enforcement of the statute is a reasonable means of combating the rampant drug and crime problems within the Housing Authority property."[28] While not unmindful of the conflict created by our differing interpretation of the first amendment issues implicated herein, the nature of the injustice inflicted by enforcement of the regulation in this case warrants reversal of the summary judgment before us. While not a public forum, Sun Plaza houses citizens of El Paso who deserve access to political information and an unfettered role in the democratic process. The values at stake are a precious cornerstone in our nation's political foundation.

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[26] *Id.* at 145 (discussing crime prevention in context of city wide regulation prohibiting door-to-door leafleting).

[27] 38 F.3d 546 (11th Cir. 1994).

[28] *Id.* at 550.

"This court has characterized the freedom of speech and that of the press as fundamental personal rights and liberties. The phrase is not an empty one and was not lightly used. It reflects the belief of the framers of the Constitution that exercise of the rights lies at the foundation of free government by free men. It stresses, as do many opinions of this court, the importance of preventing the restriction of enjoyment of these liberties."[29]

IV. Conclusion

The nature of HACEP's developments make an outright ban on door-to-door political campaigning by nonresidents an unreasonable restriction on the freedoms guaranteed by the first amendment. For the reasons assigned, we REVERSE and REMAND for further proceedings not inconsistent herewith.

RHESA HAWKINS BARKSDALE, Circuit Judge, dissenting:

I agree with the majority that resident Jesus De La O has standing to challenge the regulations at issue and that Sun Plaza Apartments, owned by the Housing Authority of the City of El Paso (HACEP), is not a public forum. However, I must dissent from the majority's holding that those regulations are not reasonable in the light of the purpose of the HACEP properties – providing affordable housing to its low income, primarily elderly residents.

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[29] *Schneider v. State (City of Irvington)*, 308 U.S. 147, 161 (1939).

I.

Jesus De La O, a Sun Plaza Apartments resident, challenges two regulations – Rules D2 and D5 – promulgated by HACEP: "Trespass After Warning" (Rule D2) and "Notices and Flyers" (Rule D5). The "Trespass After Warning" regulation limits access to HACEP property to lawful residents, invited guests, and other persons with legitimate business on the property, such as law enforcement and government personnel, utility workers, HACEP contractors, and individuals authorized by HACEP. Housing Authority of the City of El Paso, Tex., Community and Residential Rules for Public Housing and Section 8 New Construction Program, Rule D2 (19 Aug. 1998). Persons who refuse to identify themselves, or who cannot prove authorization to be on the premises, receive a "trespass warning", requiring them to leave the property or be arrested. ***Id.***

The "Notices and Flyers" regulation limits distribution of literature by residents of HACEP properties to specified hours and prohibits leaving flyers "in plain view on a resident's door" when a resident does not answer. ***Id.***, Rule D5 (as amended 1 Feb. 2000).

The HACEP Director of Housing Management stated that the purpose of Rules D2 and D5 is the protection and safety of tenants, because: most arrests on HACEP properties involve nonresidents; nonresidents sell drugs on HACEP property; and large numbers of undocumented aliens pass through HACEP property. At Sun Plaza Apartments in particular, nonresident walk-through is especially high, and the Immigration and Naturalization Service operates a surveillance station there to combat illegal immigration. Also, because Sun Plaza Apartments

is primarily inhabited by elderly residents, many in the complex are fearful of door-to-door solicitation. Furthermore, the Director explained to staff and De La O that leaving a flyer at an unanswered door would advertise to thieves that no one is at, or in, that apartment.

II.

As the majority notes, when First Amendment claims are implicated, there are three types of government-owned property under the Supreme Court's "forum analysis": the traditional public forum, the designated forum, and the nonpublic forum. *See* ***United States v. Kokinda***, 497 U.S. 720, 726-27 (1990). And, as the majority holds, Sun Plaza Apartments and other HACEP properties can be nothing other than nonpublic fora. ***Maj. Op.*** at 6. Consequently, "the state may reserve the forum for its intended purposes . . . as long as the regulation on speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view". ***Perry Educ. Ass'n v. Perry Local Educators' Ass'n***, 460 U.S. 37, 46 (1983); *see also* ***Cornelius v. NAACP Defense & Educ. Fund, Inc.***, 473 U.S. 788, 800 (1985); ***Hobbs v. Hawkins***, 968 F.2d 471, 481 (5th Cir. 1992).

As the majority holds, Rules D2 and D5 are viewpoint neutral as written and as applied. ***Maj. Op.*** at 9. Considering the uncontradicted evidence concerning HACEP's purpose for its properties, I would hold, however, that the regulations are "reasonable in light of the purpose served by the forum". ***Hobbs***, 968 F.2d at 481.

While the majority acknowledges the nonpublic forum reasonableness test, it ignores the Supreme Court's explanation of how to evaluate the reasonableness of a

regulation. "The Government's decision to restrict access to a nonpublic forum need only be *reasonable*; it need not be the *most reasonable* or the *only reasonable limitation.*" ***Cornelius,*** 473 U.S. at 808 (emphasis in original and emphasis added). The majority incorrectly concludes that the regulations are not reasonable because there are other approaches that HACEP could have taken.[30]

In contrast to the majority's method of finding another approach that it deems reasonable, we should accept the uncontested explanation of the HACEP Director of Housing Management that the "Trespass After Warning" regulation (Rule D2) is a reasonable response to the problem of rampant crime in low-income housing developments. *See* ***Daniel v. City of Tampa, Florida,*** 38 F.3d 546, 550 (11th Cir. 1994); *see* also ***Williams v. Nagel,*** 643 N.E.2d 816, 817-18 (Ill. 1994), *cert. denied,* 514 U.S. 10648 (1995) (police-issued "barred notice" authorized complexes to compile "no trespass" lists); ***People v. Kojac,*** 671 N.Y.S.2d 949, 950 (N.Y. Sup. Ct. 1998) (building management authorized police to arrest those on the premises without legitimate business); ***State v. Powell,*** 639 N.E.2d 513, 514 (Ohio Ct. App. 1994) (off-duty police officers authorized to issue trespass warnings for public housing); ***City of Dayton v. Williams,*** 1994 WL 37263 (Ohio Ct.

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[30] The majority suggests that political canvassers could obtain identification. Apart from ignoring that most of the individuals with "legitimate business on the premises" have a specific job that does not involve walking from door-to-door throughout a HACEP complex, the majority also does not address the myriad problems that would arise from this approach. For example, are there limits on the number of ID badges provided? How should HACEP determine who is a legitimate candidate? Would this authorization extend to political organizations and interest groups?

App. 1994) (public housing authority policy allowed police to issue trespass notices and arrest those who previously received warnings). Rule D2 allows residents to have guests and visitors on the premises; therefore, De La O may invite political campaigners to his apartment without restriction. The regulation merely provides HACEP with a way to deal with *unauthorized* individuals on the premises.

In fact, the majority ignores its own forum analysis. In deciding the HACEP properties are nonpublic, the majority correctly concludes that the *purpose* of the properties is *not* to provide a meeting place for the exchange of ideas but rather to provide affordable housing. ***Maj. Op.*** at 6. Once the majority reaches the reasonableness inquiry, however, it focuses on the importance of communication and access to information, which ignores that the reasonableness of the regulation should be judged by reference to the purpose of the forum.

Furthermore, while no one would disagree with the majority's most commendable interest in promoting the democratic process, another factor that is integral to the evaluation of the reasonableness of a regulation is whether alternative channels of communication exist. ***Cornelius***, 473 U.S. at 809 (direct mail and in-person solicitation outside the forum as alternatives); ***Perry Educ. Ass'n***, 460 U.S. at 53 (bulletin boards, meeting facilities, and United States mail available). The HACEP Director of Public Housing's uncontradicted affidavit explained that all HACEP properties are adjacent to public streets and sidewalks, and that De La O's complex, Sun Plaza Apartments, "is completely bounded by city streets and sidewalks" open to the public. De La O and others are free to hear the messages of various political candidates outside

their complex and decide whether to invite them inside the development in compliance with HACEP's safety regulation. Also (and obviously), there is no regulation preventing a direct mail campaign to HACEP residents.

Without addressing the readily available alternative channels of communication,[31] the majority chooses to focus on the utility of political canvassing in local elections, ignoring further guidance by the Supreme Court: "The First Amendment does not demand unrestricted access to a nonpublic forum merely because use of that forum may be the most efficient means of delivering the speaker's message". ***Cornelius***, 473 U.S. at 809; ***United States Postal Serv. v. Council of Greenburgh Civic Ass'ns***, 453 U.S. 114, 129 (1981). While door-to-door canvassing may be a more efficient means for candidates to communicate their political views, the regulations, of course, do not prevent them from speaking to residents outside the HACEP properties on the public streets and sidewalks.

The majority also mistakenly focuses on the distinction between those allowed on the premises and those not. However, the Supreme Court has spoken to this point as well:

> Implicit in the concept of the nonpublic forum is the right to make distinctions in access on the basis of subject matter and speaker identity. These distinctions may be impermissible in a public forum but are inherent and inescapable in the process of limiting a nonpublic forum to activities

[31] Instead, the majority quotes from *Martin v. City of Struthers, Ohio*, 319 U.S. 141 (1943), a case decided prior to the Supreme Court's "forum analysis" approach and holding unconstitutional a city-wide ban on door-to-door solicitation at residential homes.

> compatible with the intended purpose of the property.

Perry Educ. Ass'n, 460 U.S. at 49. Consequently, it is entirely appropriate for HACEP to make distinctions based on the identity of the speaker: residents, invited guests, and those with official business are allowed to remain, while others, such as political canvassers, uninvited solicitors, illegal aliens, and those intent on criminal activity, are required to leave.

III.

In contrast to the majority, I believe that the approach by the Eleventh Circuit seven years ago in addressing a nearly identical statute is correct. *See* ***Daniel***, 38 F.3d at 550-51. As in ***Daniel***, I would affirm the summary judgment. The two Rules at issue are reasonable because the purpose of the HACEP properties is to provide affordable housing and not a vehicle for political canvassing. Accordingly, I respectfully dissent.